Petition

81-1828

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

PAUL VAVRA, RICHARD RODER, AND EDWARD SARTAIN,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in conditionally approving portions of the Texas state implementation plan under the Clean Air Act on the ground that they did not comply with the requirements of the Act, EPA was required to impose the construction moratorium in 42 U.S.C. 7410(a)(2)(I), thereby banning any further construction or modification of major stationary sources in nonattainment areas subject to the conditionally approved portions of the plan until the state revised those portions to comply with the Act.

2. Whether, in conditionally approving certain portions of the Texas state implementation plan, EPA exceeded the scope of its authority conditionally to approve state plans and therefore was required to impose the construction moratorium in 42 U.S.C. 7410(a)(2)(I) in the nonattainment areas subject to the portions of the plan that had been invalidly approved and to promulgate federal regulations under 42 U.S.C. 7410(c)(1) correcting the deficiencies in those portions of the plan.

3. Whether the court of appeals erroneously interpreted the requirement in 42 U.S.C. 7502(b)(11)(B) regarding motor vehicle inspection and maintenance programs in nonattainment areas with particularly serious air pollution problems by holding that it does not require state legislation authorizing the actual implementation of an inspection and maintenance program but legislation merely authorizing the establishment of a schedule for the implementation of such a program.

4. Whether the court of appeals erroneously interpreted the requirement in 42 U.S.C. 7502(b)(11)(A) that states establish a program for the comprehensive analysis of major stationary sources which propose to

build or expand in nonattainment areas with particularly serious air pollution problems by holding that it requires a state to do nothing more than to ask a proposed source to conduct the analysis and, if it admits that no analysis has been done, to deny it permission to proceed.

PARTIES TO THE PROCEEDING

The petitioners in the court of appeals were the City of Seabrook, Texas, Paul Vavra, Richard Rogan, Edward Sartain and Bert Huff.

The respondents in the court of appeals was the United States Environmental Protection Agency. The State of Texas was a respondent-intervenor.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	1
Statement of the case	2
Reasons for granting the petition	12
1. The decision below sustaining EPA's conditional approval of the Texas Part D revisions and the agency's resulting decision not to impose the construction moratorium presents an issue of national importance as to which the court of appeals are in conflict	12
2. The decision below sustaining EPA's application of its conditional approval policy to the Texas Part D revisions raises an issue of national importance regarding the scope of the agency's conditional approval authority	20
3. The decision below sustaining EPA's unconditional approval of the portions of the Texas Part D revisions pertaining to motor vehicle inspection and maintenance programs and to the analyses of major stationary sources presents issues of national importance regarding the country's clean air program in nonattainment areas which have been given until December 31, 1987, to attain the national air quality standards	24
Conclusion	30
Appendix A	1a
Appendix B	45a
Appendix C	47a
Appendix D	49a

TABLE OF AUTHORITIES

CASES: Page

The Connecticut Fund for the Environment, Inc. v. Environmental Protection Agency, No. 81-4025 (C.A. 2, decided February 1, 1982) 14, 17, 23
Friends of the Earth v. EPA, 499 F.2d 1118 (C.A. 2, 1974) 15

STATUTES AND REGULATIONS:

Clean Air Act

42 U.S.C. 1857c-4 (1972) 2
42 U.S.C. 1857c-5(a) (1972) 2, 12
42 U.S.C. 7410(a) (2) 20
42 U.S.C. 7410(a) (2) (I) ..4, 13, 16, 17, 18, 21, 22, 24
42 U.S.C. 7410(c) (1) 4, 21
42 U.S.C. 7502(a) (1) 3, 13, 18, 22
42 U.S.C. 7502(a) (2) 3, 24
42 U.S.C. 7502(b) (2) 3, 14
42 U.S.C. 7502(b) (3) 4, 14
42 U.S.C. 7502(b) (4) 14
42 U.S.C. 7502(b) (5) 4
42 U.S.C. 7502(b) (6) 8, 14
42 U.S.C. 7502(b) (7) 25
42 U.S.C. 7502(b) (10) 25
42 U.S.C. 7502(b) (11) (A).....4, 7, 9, 11, 28, 29, 30
42 U.S.C. 7502(b) (11) (B) 4, 7, 11, 25, 26, 27
42 U.S.C. 7502(c) 17
42 U.S.C. 7506(a) 19, 21
42 U.S.C. 7607(b) 10
Section 129(c) of 1977 Amendments (P.L. 95-95) 4

Texas Clean Air Act

Texas Rev. Civ. Stat. Ann., Art. 4477-5 (Vernon's Supp. 1981), Section 3.30(a) 26

40 C.F.R. Part 50 2
40 C.F.R. Part 51, Appendix S 12

LEGISLATIVE MATERIALS:

S. Rep. 127, 95th Cong., 1st Sess. (1977) 27
H. Rep. 564, 95th Cong., 1st Sess. (1977) 18

TABLE OF AUTHORITIES—Continued

Page

POLICY STATEMENTS AND NOTICES:

43 Fed. Reg. 8962 (March 3, 1978) 3
44 Fed. Reg. 20372 (April 4, 1979) 25
44 Fed. Reg. 38471 (July 2, 1979) 5, 13, 19
44 Fed. Reg. 38583 (July 2, 1979) 4, 23
46 Fed. Reg. 7190 (January 22, 1981) 16

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Paul Vavra, Richard Roder and Edward Sartain petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A, 1a-44a) is reported at 659 F.2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1981 (App. B, 45a-46a), and a petition for rehearing was denied on December 3, 1981 (App. C, 47a-48a). On February 23, 1982, Mr. Justice White extended the time for filing this petition to April 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS

This case involves the Clean Air Act, 42 U.S.C. 7401, *et seq.* The provisions of the Act which are directly involved are set out in Appendix D (pages 49a-54a).

STATEMENT

In the 1970 Amendments to the Clean Air Act (Pub. L. No. 91-604, 84 Stat. 1679), Congress directed the Environmental Protection Agency to establish national ambient air quality standards (NAAQS) for air pollutants found to be harmful to the public health (primary standards) and the public welfare (secondary standards). 42 U.S.C. 1857c-4 (1972). It also directed that the nation's air be brought into compliance with these standards by mid-1975 or, in certain cases, no later than mid-1977. 42 U.S.C. 1857c-5(a) (1972). In 1971, EPA established NAAQS for five pollutants.[1]

Congress placed the primary responsibility for achieving these air quality standards upon the states. It directed the states to prepare state implementation plans ("SIPs") which would show precisely how they intended to bring their air into compliance with the national standards by the statutory deadlines. These plans were to be submitted to EPA for its review. If the Agency found that they were sufficient to achieve attainment with the standards before the deadlines and that they otherwise complied with the Act's requirements, it was required to approve them. 42 U.S.C. 1857c-5(a)(2) (1972).

The NAAQS deadlines which Congress established in the 1970 Amendments were not achieved. Although some progress was made in areas whose air did not meet the national standards ("nonattainment areas"), the vast majority of these areas continued to violate the national standards. In response, in 1977 Congress again amended the Clean Air Act. Pub. L. No. 95-95, 91 Stat. 685. In these amendments, Congress established a four-step approach to bringing the country's nonattainment areas into compliance with the national air quality standards.

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[1] These pollutants were particulate matter, sulfur oxides, nitrogen dioxide, carbon monoxide and photochemical oxidants (now ozone). See 40 C.F.R. Part 50.

First, Congress directed the states to identify the areas which, as of the date of enactment of the 1977 amendments (August 7, 1977), failed to meet one or more of the national standards. 42 U.S.C. 7407(d). It required EPA to review the identified areas and to promulgate a list of them. *Ibid.*[2]

Second, Congress established new deadlines for NAAQS compliance in the nonattainment areas. It directed the states to attain the national standards "as expeditiously as practicable" and, in the case of the primary standards, no later than December 31, 1982. 42 U.S.C. 7502(a)(1). A limited exception was provided to this December 31, 1982, deadline. If a state could demonstrate that attainment of the primary NAAQS for ozone or carbon monoxide in a nonattainment area was not possible by the end of 1982, EPA could extend the time for attainment to December 31, 1987. 42 U.S.C. 7502(a)(2).

Third, Congress directed the states to revise their implementation plans to provide for the attainment of the national standards in all nonattainment areas by the new deadlines. 42 U.S.C. 7502(a). Moreover, to ensure attainment by the deadlines, it specified a number of requirements which the revised plans had to meet.[3]

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[2] EPA promulgated the list of nonattainment areas on March 3, 1978. 43 Fed. Reg. 8962. See 43 Fed. Reg. 40412.

[3] These requirements are set forth in Part D of Title I of the Act. 42 U.S.C. 7501-7508. They include requirements which all revised plans had to meet and additional requirements which were applicable only to the plans of states which obtained an extension for one or more nonattainment areas beyond the December 31, 1982, deadline. For instance, the revised plans of all states were required to provide for the implementation of "all reasonably available control measures as expeditiously as practicable." 42 U.S.C. 7502(b)(2). They were also required to provide for annual reductions in emissions of the applicable pollutants (termed "reasonable further progress") in the period before the statutory deadline, which was to be accomplished in part by requiring existing sources of the pollutants to adopt "reasonably available control

These plan revisions were to be submitted to EPA by January 1, 1979. Section 129(c) of the 1977 Amendments, note following 42 U.S.C. 7502. EPA was to complete its review and approve or disapprove the revisions by May 1, 1979. See 42 U.S.C. 7410(a)(2). In the case of disapproval, EPA was to promulgate regulations which corrected the deficiencies in the plan revisions no later than July 1, 1979. See 42 U.S.C. 7410(c)(1).

Fourth, to ensure that state plans meeting all Part D requirements were actually in effect by July 1, 1979, Congress imposed a moratorium on the construction and modification of major new stationary sources in states which, as of July 1st, lacked a plan which fully met the Part D requirements. 42 U.S.C. 7410(a)(2)(I). Since a plan could not meet those requirements until plan revisions had been approved or promulgated by EPA (see 42 U.S.C. 7410(d)), this construction moratorium applied to all nonattainment areas which, as of July 1, 1979, were not covered by a revised state implementation plan that had been found by EPA to meet all the Part D requirements or had been promulgated, in whole or in part, by EPA to achieve compliance with those requirements.

On July 2, 1979, EPA announced a policy of "conditional approval" of Part D SIP revisions. 44 Fed. Reg.

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technology" (RACT). 42 U.S.C. 7502(b)(3). All revised plans were further required to establish a preconstruction review and permit program for new and modified major stationary sources of air pollution. 42 U.S.C. 7502(b)(5). The plans of states which received extensions beyond the December 31, 1982, deadline were also required to establish "a program" for the analysis of various alternatives to proposed major new sources which had to demonstrate that the benefits of the sources "significantly outweigh" their environmental and social costs. 42 U.S.C. 7502(b)(11)(A). These revised plans also had to "establish a specific schedule for implementation of a motor vehicle emission control inspection and maintenance program." 42 U.S.C. 7502(b)(11)(B).

Since the states' plan revisions had to meet these requirements of Part D, we have referred to them as Part D revisions.

38583. Recognizing that the construction moratorium would otherwise apply to all nonattainment areas for which "a revised plan is not in effect by July 1, 1979, to satisfy the requirements of Part D," EPA stated that it would conditionally approve a state's revisions if they were "in substantial compliance with the requirements of Part D, and the state provides assurances that any remaining minor deficiencies will be remedied within a short period * * *." *Ibid.* Such a conditional approval, EPA also announced, "would cause the restriction [*i.e.*, the construction moratorium] to end" while the states were "making reasonable and expeditious efforts toward submitting an approvable state implementation plan revision." 44 Fed. Reg. 38471.

On March 3, 1978, EPA promulgated the list of nonattainment areas in the State of Texas. Twenty-five areas were identified as nonattainment for particulate matter (TSP), 15 counties were listed as nonattainment for ozone, and one area was identified as nonattainment for carbon monoxide. 43 Fed. Reg. 9037.

On April 13, 1979, the State of Texas submitted its Part D SIP revisions to EPA. 44 Fed. Reg. 45204 (August 1, 1979). The submission covered 14 of the 25 areas which had been classified as nonattainment for particulate matter,[4] 13 of the 15 counties listed as nonattainment for ozone,[5] and the one area classified as nonattainment for carbon monoxide.

On August 1, 1979, EPA proposed action on the Texas Part D revisions. It proposed to approve only part of the revisions. As to the remainder, it found "several deficiencies that the State needs to address before the

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[4] Subsequent to the publication of the 25 TSP nonattainment areas, the state objected to the designations of 11 of the areas, and EPA eventually sustained the objections.

[5] Subsequent to the publication of the 15 counties which were nonattainment for ozone, the state requested and EPA approved the removal of 2 of the counties from the list of nonattainment areas.

full SIP approval can be granted * * *." 44 Fed. Reg. 45204. However, instead of disapproving the portions of the state's revisions which contained these deficiencies, it proposed to conditionally approve them. *Id.* at 45204-45210. The plan deficiencies and EPA's proposed conditional approval covered five portions of the state's revisions.

a. As to 8 of the 14 TSP nonattainment areas, the state failed to submit any control measures whatsoever. Its sole "control strategy" for these areas was to relocate the air quality monitors in order to obtain, in its view, a more representative reading of the areas' ambient air. 44 Fed. Reg. 45208. EPA concluded that this "control strategy for these areas was inadequate" and that "complete and relevant control strategies must be developed and must include as a minimum, emissions inventories, design values, required percentages of reduction, and demonstrations of RFP [reasonable further progress] and attainment." However, despite this conclusion, the agency proposed to approve this portion of the SIP revisions on the condition that the state submit a "draft SIP revision supplement" which contained, *inter alia*, a "reasonable schedule to adopt controls" on stationary sources and a "reasonable schedule to conduct studies to control" non-traditional sources of TSP. *Ibid.*

b. As to the other 6 TSP nonattainment areas, EPA found numerous deficiencies in the attainment demonstrations and therefore was unable to approve the revisions for those area. 44 Fed. Reg. 45208-45209. Nonetheless, it proposed to approve the revisions on the condition that the state make a new submission showing that the areas would attain the primary NAAQS for TSP by December 31, 1982. *Ibid.*

c. The state claimed that one of the 13 counties that had been designated nonattainment for ozone, Harris County, would be unable to achieve attainment by December 31, 1982, despite the implementation of all reasonably available control measures, and it requested

EPA to extend the attainment date for the county to December 31, 1987. See 44 Fed. Reg. 45205. Therefore, in its plan revisions pertaining to Harris County, the state addressed the additional SIP requirements which the Act imposed on areas exempt from the December 31, 1982, deadline. See p. 3, note 3 above. First, as to the "alternatives analysis program" required by 42 U.S.C. 7502(b)(11)(A), the state defined a two-part "program": an amendment to its permit application form which would require an applicant source to indicate whether the "alternatives analysis" had been performed and a commitment that it would advise any applicant which indicated that an analysis had not been performed that a permit could not be issued 44 Fed. Reg. 45205-45206. EPA proposed to approve this portion of the state's revisions "on the condition that the approach will operate to assure that the required analysis will be performed." *Id.* at 45206. Second, as to the motor vehicle inspection and maintenance (I/M) program required by 42 U.S.C. 7502(b)(11)(B), the state submitted with its revisions a copy of legislation which, according to EPA, required the state air board to "[p]repare for an I/M program in Harris County to allow for full implementation of the program not later than December 31, 1982." 44 Fed. Reg. 45026. Since this legislation had been only submitted in draft form, EPA approved the I/M provision of the state's revisions on the condition that the legislation which had actually been enacted be formally submitted as part of the state plan and that "necessary changes are made to the SIP to commit to the implementation of the legislation." *Ibid.*

d. As to the other 12 counties which had been designated nonattainment for ozone, the state's revisions contained a control strategy which largely consisted of the requirement, contained in its Regulation V, that reasonably available control technology (RACT) be applied to existing sources of volatile organic compounds

(VOC), the primary precursor to the formation of ozone. 44 Fed. Reg. 45204-45205. EPA found, however, that the controls which Regulation V proposed for many VOC sources were inconsistent with the RACT guidelines for those sources which EPA had scheduled in its "Control Technique Guidelines" (CTGs). *Id.* at 45207. Rather than disapproving this portion of the state's revisions, EPA proposed conditionally to approve it on the condition that "the State * * * provide an adequate demonstration that its regulations represent RACT, or amend the regulations to be consistent with the CTGs." *Ibid.* All told, EPA proposed 9 conditions to the approval of the plan revisions for these 12 ozone nonattainment counties. See *id.* at 45207-45208.

e. Finally, EPA proposed conditionally to approve the portion of the state's revisions which amended its preconstruction review and permit program. See 42 U.S.C. 7502(b)(6) and 7503. Final approval was conditioned upon the state's revising the definitions of "major source" and "major modification" to make them consistent with the federal definitions and providing for the continuation of EPA's offset ruling in ozone nonattainment areas until the state plan received final approval. 44 Fed. Reg. 45209-45210.

On December 18, 1979, EPA announced that the state had satisfied one of the conditions on which its proposed approval of the revisions relating to Harris County rested. On the basis of the final state legislation on the inspection and maintenance of motor vehicle emissions, EPA concluded that the I/M provisions in the state's plan satisfied the Act's requirement for an inspection and maintenance program. 44 Fed. Reg. 74831. It therefore gave final unconditional approval to this portion of the revised SIP. *Ibid.*

On March 25, 1980, EPA took final action on the remaining portions of state's Part D revisions. 45 Fed. Reg. 19231-19245. With respect to a few portions of the plan which it had proposed conditionally to approve on

August 1, 1979, the agency found that the conditions had been met and it granted final unconditional approval to those portions. However, most of the conditions announced on August 1st had still not been satisfied. Nonetheless, EPA granted final conditional approval to the plan portions subject to those conditions.

a. As to the 8 TSP nonattainment areas for which, as of August 1, 1979, no control strategies had been submitted, the state had still not submitted any strategies or control measures. Nonetheless, EPA conditionally approved this portion of the revisions on the condition that the state develop control strategies for these areas by certain dates. 45 Fed. Reg. 19235.

b. As to the 6 other TSP nonattainment areas, the state had satisfied most but not all of the conditions which EPA had proposed on August 1, 1979. However, because the state had not given adequate assurance that regulations on RACT were in place for certain industrial sources in the Houston TSP nonattainment area, EPA stated that it would neither approve nor disapprove this portion of the revisions until the state had provided the assurance. 45 Fed. Reg. 19235.

c. As to Harris County, which had been given an extension in the December 31, 1982, attainment deadline,[6] on the basis of the state's new permit application form and its written commitment to inform major new sources which failed to perform an "alternatives analysis" that a permit could not be issued, EPA granted final approval of the state's "program" under 42 U.S.C. 7502 (b) (11) (A) for written analyses of alternatives.

d. As to the 12 other counties which were nonattainment for ozone, EPA stated that the state had met only

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[6] On March 25, 1980, EPA took final action to extend the December 31, 1982, attainment deadline for the Harris County ozone nonattainment area until December 31, 1987. See 45 Fed. Reg. 19245.

2 of the 9 conditions proposed in August 1979. However, since the state had committed to satisfy 6 of the remaining 7 conditions by certain dates and was willing to work toward a joint resolution of the other condition, EPA conditionally approved the revisions for these counties. 45 Fed. Reg. 19233-19234.

e. Finally, EPA concluded that the state had given an adequate commitment to satisfy the conditions which had been proposed in August 1979 in conjunction with its preconstruction review and permit program. On the basis of this commitment, EPA conditionally approved the revisions involving new source review. 45 Fed. Reg. 19235-19236.

On Febuary 9, 1980, pursuant to 42 U.S.C. 7607(b), petitioners filed in the Court of Appeals for the Fifth Circuit a petition to review EPA's December 18, 1979, final unconditional approval of the portion of the state's Part D revisions pertaining to the motor vehicle inspection and maintenance program in Harris County. On May 5, 1980, they petitioned the court of appeals to review EPA's March 23, 1980, final conditional approval of many of the remaining portions of the state's revisions.[7]

On October 31, 1981, the court of appeals rejected petitioners' claims.

a. The court sustained EPA's conditional approval policy and its application in this case. As to the validity of the policy itself, it found "that petitioners' interpretation [of the Act] is a reasonable one" and acknowledged "some difficulty" with the interpretation offered by EPA in support of the policy. App. A, 11a. However, it concluded that "[w]e cannot say with any assurance that the EPA's interpretation is incorrect" or " 'plainly unreasonable' " (*id.* at 12a) and therefore sustained the conditional approval policy, including the practice under the

[7] The two petitions for review were consolidated by the court of appeals on May 29, 1980.

policy not to apply the construction moratorium whenever a state's Part D revisions receive conditional approval. As to the application of EPA's conditional approval policy in this case, it rejected petitioners' challenge, stating that "we think the EPA reasonably concluded that the deficiencies [in Texas' revisions] were minor * * * [and] that the State committed itself to making corrections within a reasonably 'short' time." *Id.* at 16a.

b. The court also sustained EPA's approval of the portion of the state's revisions pertaining to Harris County which implemented the 42 U.S.C. 7502(b)(11)(B) requirement for a motor vehicle inspection and maintenance program. In this regard, it concluded that Section 7502(b)(11)(B) only required the state's revisions to contain evidence that the legislature had authorized the state air board to establish a schedule for the implementation of an I/M program. App. A, 32a. Since the Texas legislature had provided such authority to the air board, the court held that EPA's approval of the I/M portion of the state's revisions was valid. *Id.* at 32a-33c.

c. The court also sustained EPA's approval of the portion of the state's revisions which purported to establish in Harris County the "alternatives analysis program" required by 42 U.S.C. 7502(b)(11)(A). Although the court admitted that "we find it difficult to say that the components of the Texas program correspond to the terms of the statute," it found "it equally difficult to say that the demonstration that Texas requires of permit applicants does not meet the essential concerns of [42 U.S.C.] (b)(11)(A)." App. A, 25a. The court therefore concluded that "we cannot say that EPA's approval of the state's alternatives analysis program was arbitrary, capricious, or an abuse of discretion." *Id.* at 26a.

On November 31, 1981, petitioners filed a petition for rehearing. On December 3, 1981, the court denied the petition without discussion. App. C, 47a-48a.

REASONS FOR GRANTING THE PETITION

1. THE DECISION BELOW SUSTAINING EPA's CONDITIONAL APPROVAL OF THE TEXAS PART D REVISIONS AND THE AGENCY'S RESULTING DECISION NOT TO IMPOSE THE CONSTRUCTION MORATORIUM PRESENTS AN ISSUE OF NATIONAL IMPORTANCE AS TO WHICH THE COURTS OF APPEALS ARE IN CONFLICT

In the 1977 Amendments to the Clean Air Act, Congress established a program to reduce air pollution in the nonattainment areas of the country—*i.e.*, the areas whose air quality had so deteriorated that it violated one or more of the national ambient air quality standards. 42 U.S.C. 7501-7508. This was not an entirely new program since, in the 1970 Amendments to the Act, Congress has also directed that the nation's air be brought into compliance with the national standards. See 42 U.S.C. 1857c-5(a)(1) (1972). However, since the deadlines for compliance which Congress set in 1970 (mid-1975 and, in some cases mid-1977) were not achieved, Congress was required to take further action in 1977.[8]

In the 1977 Amendments, Congress extended the deadline by which the country's nonattainment areas were to come into compliance with the primary national air quality standards to December 31, 1982, or, in the case of ozone or carbon monoxide if an extension was granted, December 31, 1987. 42 U.S.C. 7502(a). As in the 1970 Amendments, Congress placed the major responsibility for implementing its program and achieving attainment upon the states. However, Congress took two steps in the 1977

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[8] Since the Act arguably prohibited any new construction following the 1975 deadlines in areas whose air quality violated the national standards, EPA established in 1976 its "Emission Offset Policy." Under EPA's policy, new sources could be constructed in nonattainment areas but only if their emissions were more than offset by a reduction of emissions from other sources in the area. 40 C.F.R. Part 51, Appendix S (1978). EPA's offset policy therefore staved off a construction moratorium in the nonattainment areas until Congress could amend its 1970 clean air program.

Amendments which it had not taken in 1970. First, it imposed on the states a number of specific requirements which were to be included in their implementation plans. These requirements, which are set forth in Part D of Title I of the Act, were designed to ensure that the states did not repeat their failure to achieve compliance with the national standards by the new statutory deadlines. Second, in order to guarantee that the states revised the implementation plans to include these Part D requirements in time for them to have a meaningful impact on air pollution and to bring about attainment by the new deadline, Congress prohibited after July 1, 1979, the construction or modification in any nonattainment area of any major stationary source which emits a pollutant for which the area is nonattainment, unless the state has in effect an implementation plan which meets all the Part D requirements. 42 U.S.C. 7410(a)(2)(I). See 42 U.S.C. 7502(a)(1). In these ways—the specific plan requirements and the construction moratorium—Congress made clear that it was deadly serious about cleaning the nation's air by the statutory deadlines.

In sustaining EPA's conditional approval policy, the court of appeals effectively eliminated the chief means—*i.e.*, the construction moratorium—that Congress established in the 1977 Amendments to bring into effect by July 1, 1979, state implementation plans which fully met all the requirements it had determined to be necessary to achieve attainment by December 31, 1982. Under the policy, a state's Part D SIP revisions could be "approved," thereby avoiding the construction moratorium, even though the revisions did not fully meet the Part D requirements and even though the states would be required to make additional "efforts toward submitting an approvable state implementation plan revision." 44 Fed. Reg. 38471. Indeed, EPA made perfectly clear that the policy's primary purpose was to avoid the construction moratorium which otherwise would have gone into effect on July 1st. *Ibid.*; 44 Fed. Reg. 3853. There-

fore, in upholding EPA's conditional approval policy, the court of appeals confirmed the agency's authority to waive the construction moratorium in a state's nonattainment areas even though the state had failed to submit SIP revisions which fully met the requirements imposed by Congress in Part D of the Act. This holding of the court of appeals is in direct conflict with a decision of the Court of Appeals for the Second Circuit, presents an issue of broad national significance, and is inconsistent with the language and legislative history, as well as EPA's own interpretations, of the 1977 Amendments.

a. In *The Connecticut Fund for the Environment, Inc. v. Environmental Protection Agency*, No. 81-4025 (decided February 1, 1982), the Court of Appeals for the Second Circuit considered a challenge to EPA's conditional approval of the Connecticut Part D SIP revisions.[9]

[9] EPA was unable to approve Connecticut's Part D SIP revisions unconditionally because they contained a variety of deficiencies which required corrections by the state. Those deficiencies were similar to the deficiencies EPA had found in the Texas Part D revisions. The Connecticut revisions failed to fully meet five requirements in the Act: (a) for two sources of VOC, a major precursor of ozone, the revisions failed to provide for "reasonably available control technology" (RACT), as defined in EPA's Control Technology Guidelines (see 42 U.S.C. 7502(b)(2)); (2) due to this failure to provide for RACT, the revisions failed to show "reasonable further progress" toward ozone attainment (see 42 U.S.C. 7502(b)(3)); (3) as to one of the state's two TSP nonattainment areas, the revisions failed to adopt RACT for certain sources of particulate matter (see 42 U.S.C. 7502(b)(2)); (4) the revisions provided an inadequate inventory of VOC emissions in the state (see 42 U.S.C. 7502(b)(4)); and (5) the new source review and permit program under the revisions was deficient because it utilized actual rather than "allowable" emissions in determining offsets (see 42 U.S.C. 7502(b)(6)). Slip op., pp. 1118-1119. Since the state gave assurances that it would submit corrections of these deficiencies by a specified date, EPA conditionally approved the plan, thereby exempting Connecticut from the construction moratorium. *Id.* at 1115. See *id.* at 1119-1120. At the time of the court's opinion, EPA had received submissions from the state which satisfied all conditions and it had proposed unconditional approval of the revisions.

Like the court of appeals in this case, it upheld the authority of EPA conditionally to approve Part D revisions.[10] However, unlike the court of appeals here, it concluded that EPA lacked any authority to waive the construction moratorium on the basis of its conditional approval of plan revisions, and it therefore vacated EPA's conditional approval of the Connecticut Part D plan to the extent it "lifted the construction moratorium." Slip op., p. 1127. Thus, the Second and Fifth Circuits are in direct conflict regarding EPA's authority, under its conditional approval policy, to exempt nonattainment areas covered by conditionally approved Part D plans from the construction moratorium.

b. The question of EPA's authority to waive the construction moratorium through its conditional approval policy is of great national significance. Of the 51 states required to submit Part D SIP revisions by January 1, 1979, 43 received conditional approvals from EPA in 1979 or 1980. As of November 30, 1981, at least 31 states were still operating under conditionally approved Part D plans. Thus, 29 months following the date set by Congress for the imposition of the construction mora-

[10] The Second Circuit reasoned that an agency's authority to issue conditional approvals is "inherent in the power to approve or disapprove." Slip op., p. 1120. Moreover, it concluded that there is nothing in the Act which requires an "all-or-nothing choice of approval of disapproval" when EPA finds some deficiencies in a state's SIP submission. *Id.* at 1120-1121. Since the conditional approval mechanism gives EPA "the necessary flexibility" to work with the states in carrying out "its 'difficult and complex job'" (citing *Friends of the Earth v. EPA*, 499 F.2d 1118, 1124 (C.A. 2, 1974)), it found it to be a reasonable means of administering the Act and therefore was authorized under 42 U.S.C. 7601(a) which empowers the Administrator of EPA to promulgate "such regulations as are necessary to carry out his functions" under the Act. Although the Second Circuit reached the same conclusion as the court of appeals in this case regarding the general authority of EPA conditionally to approve Part D plans, it expressly rejected the reasoning utilized by the court below in reaching this conclusion. *Id.* at 1121, note 17.

torium, nonattainment areas in these 31 states continued to be exempt from the moratorium, even though they still were covered by an implementation plan which EPA had found did not fully meet the requirements of Part D.[11]

If the decision of the Second Circuit in *Connecticut Fund for the Environment* is correct, no construction or modification of major stationary sources can occur in the nonattainment areas of the 31 states still with conditional approvals until final unconditional approval of their Part D plans is obtained. Moreover, the construction or modification of any major source which applied for and received its permit after July 1, 1979, from a state with a conditionally approved Part D plan would be invalid, and any further construction or operation of such sources would have to terminate until the sources were reviewed and permitted to proceed pursuant to an unconditionally approved Part D plan.[12] On the other hand, of course, if the decision below is correct, the conditional approvals given the states' Part D revisions since 1979 would constitute a valid waiver of the construction moratorium.

The question raised in this petition is also of crucial importance for the approximately 31 states which have received from EPA an extension beyond December 31, 1982, in the time to attain the national standards for ozone or carbon monoxide. See 46 Fed. Reg. 7190. The Act requires these states to submit to EPA additional Part D plan revisions "before July 1, 1982" (Section 129(c) of the 1977 Amendments, note under 42 U.S.C.

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[11] These statistics are contained in an EPA memorandum, dated September 18, 1981, from G. T. Helms to Walter C. Barber on the subject of the "Status of Part D SIP Conditions," and an EPA chart, entitled "Status of Part D Actions as of 11/30/81."

[12] Such sources would likely have to reapply for a permit under the unconditionally approved implementation plan since the Act provides that sources applying for construction permits after July 1, 1979, are to be reviewed under a plan which meets all the requirements of Part D. 42 U.S.C. 7410(a)(2)(I).

7502) and to have "effective on such date * * * enforceable measures to assure attainment of the applicable standard not later than December 31, 1987" (42 U.S.C. 7502(c)). Unless these states have revised Part D plans approved and in effect by July 1, 1982, their plans will not meet the "requirements of Part D" and the construction moratorium will apply. 42 U.S.C. 7410 (a)(2)(I).

The question presented in this petition involves the effect an EPA conditional approval of these states' revised Part D plans will have upon the construction moratorium.[18] Under the Second Circuit's decision in *Connecticut Fund for the Environment*, while EPA may conditionally approve these revised plans, the construction moratorioum would nonetheless apply. On the other hand, under the decision of the court below, EPA's conditional approval would constitute a waiver of the construction moratorium.

For these reasons, the conflict between the decision below and the decision of the Second Circuit in *Connecticut Fund for the Environment* regarding the effect of EPA's conditional approval of state implementation plans on the Clean Air Act's construction moratorium is of major and continuing national significance.

c. The court of appeals below erred in sustaining EPA's authority to give conditional approval to Part D plan revisions and thereby to exempt nonattainment areas from the construction moratorium. Congress did not intend the moratorium to be subject to any discretionary decision by

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[18] As we have seen (see page 15 above), 43 states received conditional approvals of at least part of their Part D plan revisions from EPA in 1979 and 1980. This represents over 80% of the states which were required to submit revisions. There is no reason to doubt that a comparable percentage of the 31 states (including Texas) which have received extensions beyond 1982 to comply with the primary NAAQS for ozone or carbon monoxide and which are to submit additional Part D revisions this summer will receive conditional approvals.

EPA. Rather, it intended its application to nonattainment areas to be automatic and mandatory whenever a particular event occurred after July 1, 1979—*i.e.*, the state plan for the area had not been approved by EPA as meeting all applicable Part D requirements. This intent is set forth in the plain language of Act, 42 U.S.C. 7410 (a) (2) (I), which provides:

> no major stationary source shall be constructed or modified in any nonattainment area * * *, if the emissions from the facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of Part D * * *.

Congress' intent is also shown by 42 U.S.C. 7502(a) (1) which describes the requirement in Section 7410(a) (2) (I) that state plans meet the requirements of Part D as a "precondition for the construction or modification of any major stationary source in any [nonattainment] area on or after July 1, 1979 * * *."[14]

This nondiscretionary nature of the construction moratorium is confirmed by the legislative history of the 1977 Amendments. In adopting the moratorium concept from the Senate bill (S. 252) and adding subsection (a) (2) (I) to 42 U.S.C. 7410, the Conference Committee stated: "As a condition for permitting major new sources to locate in a nonattainment area, States are required to have approved revised implementation plans." H. Rep. 564, 95th

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[14] 42 U.S.C. 7502(a)(1) also makes clear that the reference in Section 7410(a)(2)(I) to a "plan [which] meets the requirements of Part D" is to a plan which has been fully approved by EPA. Section 7502(a)(1) describes the plan provisions required by Section 7410(a)(2)(I) as provisions of an "applicable implementation plan." 42 U.S.C. 7410(d) defines an "applicable implementation plan" as "the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements the requirements of this section."

Cong., 1st Sess. 121 (1977). This was confirmed by Senator Muskie, who was the primary sponsor of the Senate bill, in explaining the moratorium provision reported by the Conference Committee: "For areas violating any national ambient air quality standard, the States must submit revised implementation plans by January 1, 1979. * * * On and after July 1, 1979, new and modified sources may be granted construction permits only if the permits are in conformity with the requirements for revised implementation plans set forth in the conference bill." [15]

Finally, EPA itself has expressly acknowledged the nondiscretionary nature of the moratorium provision (44 Fed. Reg. 38472 (July 2, 1979)):

> c. *Nondiscretionary Statutory Restriction on New Sources.* The statute's language and legislative history indicate that the statutory restriction is *automatic and mandatory under the Act* * * * and is not

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[15] The mandatory character of the construction moratorium is also shown by the history of the Act's provision for withholding certain grants from the states as a sanction for failing to submit revised Part D plans. In the bill reported by the Senate Committee on Environment and Public Works, the Administrator was required to terminate grants to any State which had not submitted a revised SIP by January 1, 1979. See Section 7 of S.252 (adding a Section 110(h)(8)) to the Act). This provision was amended on the Senate floor to reduce the "sanction for failure to submit implementation plans in a timely fashion." Comments of Senator Gravel, 123 Cong. Rec. S18475-18476 (daily ed. June 10, 1977). Under the amendment, which is now contained in 42 U.S.C. 7506(a), grants may be withheld only if the Administrator finds that a plan submitted by a state fails to consider all the requirements in 42 U.S.C. 7502 or that the state is not making "reasonable efforts toward submitting" such a plan. See *ibid.* While Congress rejected a mandatory application of the "grants withholding" sanction and replaced it with a discretionary approach, it did not take similar action regarding the construction moratorium. This amendment confirms Congress' intent that the construction moratorium was to apply on July 1, 1979, regardless of the reason for a state's failure to have in effect a revised plan meeting all the requirements of Part D.

> a new prohibition that can be imposed or withheld at EPA's discretion.
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> * * *
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> The Clean Air Act provides unambiguously that the statutory restriction is to apply after June 30, 1979, if a state plan does not satisfy the requirements of Part D * * *. [emphasis added]

Clearly, EPA's conditional approval policy, which has resulted in a nationwide waiver of the construction moratorium on the basis of discretionary determinations regarding the seriousness of Part D plan deficiencies and the time required to correct them, is in direct conflict with the agency's own view that the Act's moratorium provision is nondiscretionary and mandatory.

2. THE DECISION BELOW SUSTAINING EPA'S APPLICATION OF ITS CONDITIONAL APPROVAL POLICY TO THE TEXAS PART D REVISIONS RAISES AN ISSUE OF NATIONAL IMPORTANCE REGARDING THE SCOPE OF THE AGENCY'S CONDITIONAL APPROVAL AUTHORITY

The court of appeals' decision to uphold the application of EPA's conditional approval policy in this case presents the question of the scope of EPA's authority to approve state implementation plans or plan revisions on a conditional basis. This question is of critical importance to the administration of the country's clean air program. As we have seen, the policy affects, or at some point will affect, practically every state implementation plan. Since the Clean Air Act imposes obligations upon EPA when it is unable to approve a state plan or plan revision—the obligations to apply the construction moratorium and to promulgate federal SIP regulations [16]—the question regard-

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[16] 42 U.S.C. 7410(a)(2) requires EPA to approve any state plan or revision which meets the requirements set forth in Sections 7410(a)(2)(A)-(K). If approval is not given to a plan or revision, it must, under Section 7410(a)(2), be disapproved. In the case of disapproval, the Act imposes two obligations upon EPA. First, it must apply a moratorium on all future construction in the areas

ing the scope of EPA's conditional approval authority inherently involves the circumstances under which EPA is required to exercise these important statutory obligations.

In this case, the Part D revisions which Texas initially submitted to EPA on April 13, 1979, contained no provisions whatsoever for eight areas of the state which had been designated nonattainment for particulate matter (TSP). For these areas, therefore, the state's plan failed to meet any of the requirements in Part D. Despite recognizing this major deficiency and expressly stating that "in order to be approvable, complete and relevant control strategies must be developed [by the state] and must include as a minimum, emission inventories, design values, required percentages of reduction, and demonstrations of RFP and attainment," EPA nonetheless proposed conditionally to approve this portion of the state's Part D plan. 44 Fed. Reg. 45208. EPA announced that it was proposing this action because the state had "com-

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which lack an approved plan. 42 U.S.C. 7410(a)(2)(I). Second, it must promulgate federal SIP regulations for the areas within six months of the date on which the state plan or revision was to be submitted unless, prior to the date for promulgation, the "State has adopted and promulgated a plan (or revision) which [EPA] determines to be in accordance with the requirements of this section." 42 U.S.C. 7410(c)(1). In addition, disapproval of a state plan or revision may result in the termination of certain federal grants to the state. Under 42 U.S.C. 7506(a), if EPA's disapproval is accompanied by a finding that the state is not making reasonable efforts toward submitting an approvable plan, it, together with the Department of Transportation, is prohibited from awarding many transportation-related grants to the state for use in any nonattainment area where the implementation of transportation control measures is necessary for attainment.

As to EPA's obligation to impose the construction moratorium in 42 U.S.C. 7410(a)(2)(I), we submit, as the Second Circuit held, that the obligation does not arise only upon EPA's disapproval of a plan or plan revision but whenever the agency determines that a plan or a revision cannot be fully and unconditionally approved. See Section 1 above. However, even if that view is incorrect, EPA plainly has the obligation to impose the moratorium upon the disapproval of a plan or plan revision.

mitt[ed] to develop revisions to the SIP (on a specified schedule) which will include control strategies for the deficient areas." *Ibid.* See 45 Fed. Reg. 19235.

Almost eight months later, on March 25, 1980, EPA issued a final conditional approval of the portion of the state's Part D plan which covered these eight TSP nonattainment areas. 45 Fed. Reg. 19235. EPA issued this conditional approval even though the state still had not submitted any control strategies for these areas and consequently had demonstrated neither "reasonable further progress" nor attainment by the statutory deadline. *Id.* at 19234-19235. While the state had committed itself at the time of the proposed conditional approval to submit control strategies (see 44 Fed. Reg. 45208), all that it had given to EPA by the time of the final conditional approval was a "workplan" which provided for the "*development* of control strategies * * * which would indicate attainment" by the statutory deadline (emphasis added). 45 Fed. Reg. 19235.[17]

EPA's conditional approval of this portion of the Texas Part D plan clearly raises the question of the scope of its conditional approval authority. In essence, the question focuses on the line separating a permissible conditional approval, which, according to EPA and the Fifth Circuit, enables a state to escape the construction moratorium and EPA to avoid the obligation to promulgate federal SIP regulations, and a required disapproval, which requires

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[17] EPA conditioned its approval of this portion of the state's Part D plan upon the submission of a supplemental SIP revision by August 1, 1980. 45 Fed. Reg. 19235. The state submitted a supplemental revision in late July 1980. On the basis of that submission, EPA proposed on June 8, 1981, to approve unconditionally the portion of the state's Part D plan covering the eight TSP nonattainment areas. 46 Fed. Reg. 30367. Final unconditional approval was announced on September 29, 1981 (46 Fed. Reg. 47544), more than two years after the date set by Congress for all state plans "to meet[] the requirements of Part D * * *." 42 U.S.C. 7410(a)(2)(I). See 42 U.S.C. 7502(a)(1).

both the ban on construction and the promulgation of federal regulations.

The critical characteristic of this line is demonstrated by the decisions of the court of appeals in this case and the Second Circuit in *The Connecticut Fund for the Environment v. EPA*. Both courts based their holding that EPA had authority conditionally to approve Part D revisions on the nature of the plan provisions which had been submitted and the findings which those provisions enabled EPA to make. The courts reasoned that EPA could issue a conditional approval so long as the submitted plan provisions substantially complied with the Act's requirements and the plan deficiencies were so minor that the agency could legitimately find that the Act's major goals of "reasonable further progress" and timely attainment of the national standards would not be compromised by the delay in adopting a fully approvable plan. See App. A, 14a, 15a-16a. *Connecticut Fund for Environment v. EPA, supra*, slip op., p. 1120. Indeed, EPA's conditional approval policy itself requires that the plan revisions "be in substantial compliance" with the requirements of Part D and possess only "minor deficiencies [which] will be remedied within a short period * * *." 44 Fed. Reg. 38583.

Assuming *arguendo* that EPA has some discretion in applying the conditional approval policy, it clearly exceeded the scope of any conditional approval authority it might have when it conditionally approved the Texas Part D plan revisions covering the eight TSP nonattainment areas. Since no control strategies or other plan materials had been submitted for these areas, EPA did not find, and could not have found, that there had been "substantial compliance" with the Part D requirements, that the state's submission contained only "minor deficiencies," or that the time needed for the state to obtain a fully approvable plan would not interfere with the achievement of the Act's major goals of "reasonable further progress" and "timely attainment." While the state promised to submit a sup-

plemental revision which would meet the requirements of Part D for the eight areas (45 Fed. Reg. 19235), this is irrelevant since the Act required such a plan to be in effect by July 1, 1979 (42 U.S.C. 7410(a)(2)(I)) and provided no authority to EPA to extend this deadline. Consequently, EPA plainly was required to promulgate federal SIP regulations for the eight nonattainment areas, as well as to impose the construction moratorium.

In view of its importance to the administration of the Clean Air Act throughout the country, we submit that the issue of the scope of EPA's authority conditionally to approve state implementation plans should be reviewed by this Court.

3. **THE DECISION BELOW SUSTAINING EPA'S UNCONDITIONAL APPROVAL OF THE PORTIONS OF THE TEXAS PART D REVISIONS PERTAINING TO MOTOR VEHICLE INSPECTION AND MAINTENANCE PROGRAMS AND TO THE ANALYSES OF MAJOR STATIONARY SOURCES PRESENTS ISSUES OF NATIONAL IMPORTANCE REGARDING THE COUNTRY'S CLEAN AIR PROGRAM IN NONATTAINMENT AREAS WHICH HAVE BEEN GIVEN UNTIL DECEMBER 31, 1987, TO ATTAIN THE NATIONAL AIR QUALITY STANDARDS**

In the 1977 Amendments, Congress authorized EPA to extend the deadline for attainment of the primary national standards for ozone and carbon monoxide beyond December 31, 1982, upon a demonstration that attainment by that date "is not possible in a[] [non-attainment] area * * * despite the implementation of all reasonably available measures * * *." 42 U.S.C. 7502(a)(2). Such extensions, however, are not without a price. Congress required that any state receiving an extension beyond the December 31, 1982, deadline implement special air quality control measures in the non-attainment areas affected by the extension. These measures include a motor vehicle emission control inspection and maintenance (I/M) pro-

gram and a program for the comprehensive analysis of major stationary sources prior to the issuance of permits authorizing their construction or modification. These special measures are to be included in the state's Part D implementation plans. 42 U.S.C. 7502(b)(11)(A) and (B).

We submit that the court of appeals erred in sustaining EPA's approval of the portions of the Texas Part D revisions which purported to comply with the Act's requirements for an "I/M" program and an "alternatives analysis program." These errors are of national importance because they stem from interpretations of the Act which are applicable to the Part D plans of all the 31 states which have received an extension of the December 31, 1982, attainment deadline. These interpretations therefore will affect the manner in which the special control measures that Congress required for nonattainment areas receiving an extension of the 1982 deadline will be implemented across the country.

a. The Act required that the Texas Part D revisions "establish a specific schedule for implementation" of an I/M program. 42 U.S.C. 7502(b)(11)(B). Moreover, based on the Act's requirement that Part D plans include evidence of the states' legal authority to carry out all required plan provisions,[18] EPA had required that the states' part D revisions show that they had "adequate authority to carry out" their I/M program. See 44 Fed. Reg. 20377. Even though no I/M implementation schedule was submitted by Texas for Harris County, EPA unconditionally approved the I/M portion of its Part D re-

[18] 42 U.S.C. 7502(b)(10) requires that all Part D SIP revisions contain "written evidence that the State * * * ha[s] adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan." 42 U.S.C. 7502(b)(7) requires that the Part D revisions "identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection."

visions based upon a 1979 amendment to the Texas Clean Air Act which authorized the Texas Air Control Board (TACB) to conduct a pilot I/M program in the county and to establish a schedule for implementation of a program in the county before December 31, 1981. 44 Fed. Reg. 74830. However, contrary to EPA's view of that legislation, the court of appeals found that it did "not authorize the TACB, or anyone else, to implement the schedule [to be] devised." [19] App. A, 27a-28a. The court therefore concluded that, "[i]f we accept the interpretation of [42 U.S.C. 7502(b)(11)(B)] adopted by the EPA * * *, we would hold the agency's approval of the inspection and maintenance portion of the SIP revisions to be arbitrary and capricious." *Ibid.*

The court of appeals rejected EPA's interpretation of the Act. It held that 42 U.S.C. 7502(b)(11)(B) does not require the state's Part D revisions to show that the state has established an I/M program or even that legislative authority for a program has been enacted. App. A, 28a-33a. Rather, it held that the revisions need only contain "written evidence that the legislature has provided the legal authority to 'establish a specific schedule for implementation' of an inspection and maintenance program." *Id.* at 32a. Since the Texas legislature had provided such authority to the state's air board, the

[19] The state legislation required the TACB to present a report based on its pilot program and its recommendations for the establishment of an I/M program in the state to the 67th Texas Legislature which was to convene in January 1981. Texas Rev. Civ. Stat. Ann., Art. 4477-5 (Vernon's Supp. 1981), Section 3.30(a). The TACB schedule for implementing an I/M program in Harris County could only be carried out if the 67th Legislature specifically authorized the Board to do so. The 67th Legislature, which adjourned on June 1, 1981, did not authorize the implementation of any I/M program in Harris County. The next session of the Texas legislature does not convene until 1983. Thus, over 32 months following the date on which Congress intended all Part D revisions be in effect, Texas still has not established a schedule for implementing an I/M program in Harris County and, indeed, still has not even enacted authority for such a program.

court concluded that the I/M portion of the state's Part D revisions satisfied the requirements of the Act. *Id.* at 32a-33a.

The court of appeals' decision is clearly erroneous. It is directly contrary to the language of 42 U.S.C. 7502(b)(11)(B) which requires that states receiving any extension of the December 31, 1979, attainment deadline submit Part D revisions which "establish a specific schedule for implementation" of an I/M program. This section plainly reflects Congress' intent to require such states to put into operation an inspection and maintenance program and to set forth in their Part D revisions a timetable for doing so.

This intent is confirmed by the legislative history of Section 7502(b)(11)(B). The section stemmed from the Senate bill's proposed amendment to Section 110(h)(1)(F)(iii) of the Act. In discussing that section, the Senate Committee on Environment and Public Works stated that "[t]he bill makes clear that an inspection and maintenance program is a reasonable [control] measure. *Such a program is made a precondition for extensions of deadlines for attainment of [the] oxidant [now ozone] and carbon monoxide standards beyond 1982*" (emphasis added). S. Rep. No. 127, 95th Cong., 1st Sess. 40 (1977). Clearly, therefore, contrary to the court of appeals' view, Congress intended the states to show far more in their Part D revisions than the mere authority to establish a schedule for implementing an I/M program. Instead, we submit, Congress unmistakably required the states both to show authority to implement the program and to adopt a specific schedule for its implementation, neither of which the court acknowledged had been done by the State of Texas. App. A, 27a-28a.

Thus, the court of appeals' decision on the I/M issue is clearly in error. As a result, Harris County is still without an I/M program. Moreover, since the state's plan for the county was not disapproved, the county has been able to avoid the construction moratorium which would have

been imposed if the court had found that the state's plan did not meet the Act's I/M requirements. Similarly, the effect of the court of appeals' decision will be to undermine the implementation of I/M programs in many of the other states which have received an extension of the 1982 attainment deadline.

b. The Act also required for areas receiving extensions of the December 31, 1982, deadline for attaining the national standards for ozone and carbon monoxide that the Part D revisions "establish a program" which requires a comprehensive analysis of new sources of pollution before permits may be granted. 42 U.S.C. 7502(b)(11)(A).[20] The court of appeals held that this requirement was satisfied by the state's two-step approach—a check-off box on its permit application form asking whether the analysis had been done for the applicant source and the state's written commitment to inform any applicant which failed to check the box that a permit could not be issued to it. App. A, 23a-26a. The court therefore upheld EPA's approval of this portion of the state's Part D revisions. *Id.* at 25a-26a. We believe that the court seriously misinterpreted the statute.

Section 7502(b)(11)(A) contains three important requirements which Congress imposed on states in return for an extension in the attainment deadline beyond December 31, 1982, for one or more of their nonattainment areas. First, it places a substantive requirement upon any major stationary source which wishes to construct or expand in or near an "extended" nonattainment area. In order for the source to build or expand, the benefits associated with its construction or expansion and its sub-

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[20] 42 U.S.C. 7502(b)(11)(A) provides that the program must "require[], prior to issuance of any permit for construction of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques * * * which demonstrates that [the] benefits of the proposed source significantly outweigh [its] environmental and social costs * * *."

sequent operation must "significantly outweigh" its environmental and social costs. If a source does not meet this substantive requirement, Congress has prohibited its construction or expansion. Second, the section places a procedural requirement upon the state or the source which wishes to construct or expand in or near an "extended" nonattainment area to "demonstrate" that the section's substantive requirement is satisfied by the source. Moreover, the state or source is required to conduct an analysis of various alternatives to the source —"alternative sites, sizes production processes, and environmental controls." Third, Section 7502(b)(11)(A) requires the state to establish in its Part D plan a "program" which will apply the substantive and procedural requirements discussed above and ensure that they are properly satisfied before any stationary source may build or expand in an "extended" nonattainment area.

By sustaining EPA's approval of the state's two-step approach to Section 7502(b)(11)(A), the court of appeals totally ignored the section's requirement for a "program." Despite its recognition that, "when Congress outlined the general elements and purpose of [the alternatives analysis program], it intended the states to establish programs which incorporated those elements and achieved that purpose" (App. A, 24a), the court ignored the fundamental purpose of the Section 7502(b)(11)(A) "program"—to ensure compliance with the section's substantive and procedural requirements. The state's two-step approach to Section 7502(b)(11)(A) cannot possibly constitute a "program." It provides, as the court of appeals itself recognized (App. A, 23a), no guidance regarding the analysis which is to be conducted or the substantive standard which must be met. It provides no opportunity for review and comment on the analysis by interested persons so to ensure that an honest and accurate analysis is performed. It does not provide for any review by the state itself to ensure that the analysis was honestly and accurately performed and that it sup-

ports a finding that the Congressionally-imposed substantive requirement—that the source's benefits "significantly outweigh" its costs—has been met. Indeed, the state's two-step approach turns the entire issue over to the sources of pollution which are seeking authorization to build or expand. As a result, the state's purported "program" imposes neither the substantive nor the procedural requirement of Section 7502(b)(11)(A).

We therefore submit that the court of appeals seriously erred in interpreting 42 U.S.C. 7502(b)(11)(A) and in approving the portion of Texas' Part D revisions establishing an "alternatives analysis program." This error of the court is particularly significant because it involves one of the specific "control resources" which Congress required to be implemented in nonattainment areas receiving an extension of the December 31, 1982, deadline. Moreover, the court's definition is of national importance because the 30 other states which have nonattainment areas that have been released from the December 31, 1982, deadline will undoubtedly look to the decision below for guidance in establishing or revising their Section 7502(b)(11)(A) "alternatives analysis programs."

CONCLUSION

We respectfully submit that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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April 2, 1982

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT *
UNIT A

Nos. 80-1138, 80-1520

CITY OF SEABROOK, TEXAS, *et al.*,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Oct. 30, 1981

Petitions for Review of Orders of the
United States Environmental Protection Agency

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

The City of Seabrook and four residents of Harris County, Texas, filed two petitions asking this court to set aside the action taken by the Administrator of the Environmental Protection Agency in approving and conditionally approving various portions of the plan adopted by the state of Texas to comply with the Clean Air Act Amendments of 1977.[1] We consolidated the petitions and

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

[1] Petitioners also filed a suit in federal district court challenging some of the same actions. Petitioners' appeal from the district court's dismissal of the suit, which was consolidated for oral argu-

granted the state's motion to intervene. We now deny the petitions.

I. *Statutory and Factual Background*

The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 [hereinafter cited as 1977 Amendments], added a new Part D to Subchapter I of the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (Supp. III 1979)[2] [hereinafter cited as CAA]. Part D was added because many states had failed to attain the "national primary ambient air quality standards," despite their adoption and the EPA's approval of "state implementation plans" ("SIPs") which had been designed to attain those standards by 1975. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 208-10, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077, 1286-87. The 1977 Amendments required the EPA to identify the areas in each state which did not meet the national standards,[3] and required each state to revise its implementation plan for these "nonattainment areas."[4] Section 172 of Part

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ment with their petitions, is also decided today. *City of Seabrook v. Costle*, —— F.2d —— [slip op. 12710] (5th Cir. 1981).

[2] All code citations for the Clean Air Act are to the 1979 supplement to the 1976 edition, unless otherwise indicated. After the Act was amended in 1977, its provisions were transferred from 42 U.S.C. §§ 1857-1858a to 42 U.S.C. §§ 7401-7642. In order to minimize the confusion concerning the section to which we are referring, in textual discussion we refer to the sections as designated in the Act itself, and we provide citations to the sections of 42 U.S.C. in which the Act is currently codified.

[3] *See* 42 U.S.C. § 7407(d).

[4] The operative provision of the 1977 Amendments was § 108(b), which added subparagraph (I) to the requirements for every SIP listed in § 110(a)(2) of the Act. *See* 42 U.S.C. § 7410(a)(2)(I). Subparagraph (I) requires every SIP to provide that, after June 30, 1979, no construction or modification of a major stationary source of a pollutant will take place in an area designated "nonattainment" for such pollutant unless the SIP meets the requirements of Part D. *Id.*

D specified the provisions to be included in the revised plans. CAA § 172(a)(1), (b)(1)-(10), 42 U.S.C. § 7502 (a)(1), (b)(1)-(10). The foremost requirement of § 172 was that the plan "provide for attainment" of the national primary standards "not later than December 31, 1982." CAA § 172(a)(1), 42 U.S.C. § 7502(a)(1).[5] Section 172(a)(2) and (b)(11) required additional provisions in a SIP if the state received an extension beyond this 1982 deadline. 42 U.S.C. § 7502(a)(2), (b)(11).

Texas was required to submit a Part D SIP revision for several "nonattainment areas." In addition, Texas asked for an extension for attainment of the photochemical oxidants (ozone) standard for Harris County; therefore, it was required to include in its plan for Harris County the additional provisions listed in § 172 (a)(2) and (b)(11).

Petitioners complain that the procedures adopted by the EPA in passing on the state's Part D revisions—in particular, the use of "conditional approval"—violated the deadlines set by the statute. They also argue that the state's plan failed to satisfy many of the substantive requirements of Part D. We deal first with the EPA's procedures, and then with the substance of the Texas plan.

II. *The Statutory Deadlines and "Conditional Approval"*

A. *The State's Failure to Comply with the Statutory Deadlines*

Under the 1977 Amendments, Texas was required to identify and submit a list of its nonattainment areas by December 5, 1977; the Administrator of the EPA was

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[5] While December 31, 1982 was set as a deadline for the primary standards, § 172(a)(1) required the plan to provide for the attainment of all national ambient air quality standards—both primary and secondary, *see* 42 U.S.C. § 7409—"as expeditiously as practicable." 42 U.S.C. § 7502(a)(1).

required to "promulgate" the list "with such modifications as he deem[ed] necessary" not later than 60 days after its submission. CAA § 107(d)(1)-(2), 42 U.S.C. § 7407(d)(1)-(2). Texas was then required to submit its Part D revisions by January 1, 1979. 1977 Amendments, Pub. L. No. 95-95 § 129(c), 91 Stat. 685 *as amended by* Pub. L. No. 95-190 § 14(b)(4), 91 Stat. 1393 (see note under 42 U.S.C. § 7502). The EPA, in turn, was required to "approve or disapprove" the plan by May 1, 1979.[6] If Texas failed to submit a plan by January 1, or if the EPA determined that the plan or a portion of the plan should be disapproved, the EPA was required to "*promptly* prepare and publish proposed regulations setting forth an implementation plan, or portion thereof." CAA § 110(c)(1), 42 U.S.C. § 7401(c)(1) (emphasis added). With a single exception to be discussed later, the EPA was required to promulgate the regulations it had proposed by July 1, 1979. *Id.*

Texas and the EPA quickly fell behind this statutory schedule. The Texas Air Control Board (TACB) did not adopt a list of "nonattainment areas" until January 9, 1978. While the EPA published what purported to be a "final rule" on March 3, 1978, within the 60-day deadline, *see* 43 Fed. Reg. 8962, 9037-38, the publication functioned in one way as a notice of proposed rulemaking, since it solicited comments which it would consider in "revising" the "final" nonattainment designations. *Id.* at 8962.[7] A second "final rule" was published on Sep-

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[6] This deadline was set, not by the 1977 law itself, but by § 110(a)(2) of the existing Clean Air Act, which provides that "[t]he Administrator shall, within four months after the date required for submission of a plan . . ., approve or disapprove such plan or each portion thereof." 42 U.S.C. § 7410(a)(2).

[7] The procedure the EPA employed in its attempt to meet the statutory deadlines drew differing reviews from the courts. *Compare United States Steel Corp. v. USEPA*, 595 F.2d 207, 213-15 (5th Cir. 1979) (holding that, nowithstanding the statutory deadlines, EPA should have complied with the rulemaking procedures

tember 11, 1978, 43 Fed. Reg. 40412, in which the EPA designated an additional Texas nonattainment area, *id.* at 40418, 40433. Texas did not submit its SIP revisions until April 13, 1979. The EPA did not approve or disapprove the revisions by May 1, 1979, and it did not promulgate its own implementation plan for Texas by July 1, 1979.

Instead, the EPA published a notice on August 1, 1979, proposing to approve the SIP revisions in part, "conditionally approve" in part, and disapprove in part, and it invited public comment on its proposals. 44 Fed. Reg. 45204. The EPA took "final" action on these proposals in two installments. On December 18, 1979 the EPA granted the state's request for an extension of the attainment date for the ozone standards in Harris County, and it fully approved the vehicle inspection and maintenance provisions thereby required to be added to the SIP, *see* CAA § 172(b)(11)(B), 42 U.S.C. § 7502(b)(11)(B). 44 Fed. Reg. 74830, 74832. On March 25, 1980, the EPA published a "final rule" approving and "conditionally approving" the remaining portions of the SIP revisions,[8] in most instances following its August 1 proposals. 45 Fed. Reg. 19231.

B. *Conditional Approval*

The EPA granted "conditional approval" to the Texas SIP revisions pursuant to a policy statement published on July 2, 1979. 44 Fed. Reg. 38583. In this statement, the EPA announced that it would grant conditional ap-

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of the Administrative Procedure Act), *clarified on other grounds*, 598 F.2d 915 (5th Cir. 1979), *and Sharon Steel Corp. v. EPA*, 597 F.2d 377, 379-81 (3d Cir. 1979) (same), *with United States Steel Corp. v. USEPA*, 605 F.2d 283, 286-91 (7th Cir. 1979) (contra), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980).

[8] The EPA also took no action on a few portions of the SIP. Petitioners raise no objection to the EPA's reasons for deferring action on these few portions.

proval if "a plan has been revised so as to be in *substantial compliance* with the requirements of Part D, and the state provides [strong] assurances that any remaining minor deficiencies will be remedied within a short period." *Id.* (emphasis added). The EPA cautioned, however, that if the state failed to make the needed corrections on the "specified schedule" set out in the notice of conditional approval,[9] it would withdraw the conditional approval and disapprove the plan. *Id., as supplemented by* 44 Fed. Reg. 67182 (Nov. 23, 1979).

Petitioners argue that the statutory command that the EPA "shall . . . approve or disapprove," § 110(a)(2), 42 U.S.C. § 7410(a)(2), leaves no room for the device of "conditional approval." A "conditional approval," they argue, is in effect a determination that the SIP is "not . . . in accordance with the requirements" of the statute, a determination that requires the EPA to promulgate an implementation plan for the state. CAA § 110(c)(1)(B), 42 U.S.C. § 7410(c)(1)(B).

The EPA, of course, interprets § 110 differently. In evaluating its interpretation, we are mindful of the Supreme Court's admonition that if the EPA's construction of the Act is reasonable, we must hold that it is " 'correct,' to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the 'correct' one." *Train v. NRDC*, 421 U.S. 60, 87, 95 S.Ct. 1470, 1485, 43 L.Ed.2d 731 (1975). As the District of Columbia Circuit recently reiterated:

> Where different interpretations of the statute are plausible, so long as EPA's construction of the statute is reasonable we may not substitute our own interpretation for the Agency's. [*Train v. NRDC*,

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[9] This schedule was to be negotiated by the state and the EPA regional office prior to the grant of conditional approval. 44 Fed. Reg. at 38583.

> 421 U.S. at 75, 95 S.Ct. at 1479.] "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong[.]" *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed.2d 371 (1967) . . . . Deference to the Administrator's interpretation is particularly appropriate in construing a statute that invests him with a considerable amount of discretion. Unless it can be shown that the Administrator's construction of the statute is plainly unreasonable, we must uphold his interpretation.

Lead Industries Association, Inc. v. EPA, 647 F.2d 1130, 1147 (D.C. Cir.) (citations and footnote omitted), *cert. denied*, —— U.S. ——, 101 S.Ct. 621, 66 L.Ed.2d 503 (1980).

The EPA contends that § 110(c)(1)(C) supports its conditional approval policy. An assessment of this argument requires an examination of the anatomy of § 110. Subsection (a)(2) provides that "[t]he Administrator shall, within four months after the date required for submission of a plan . . . approve or disapprove such plan or each portion thereof." Paragraph (2) goes on to provide that "the Administrator shall approve such plan, or any portion thereof" if he finds that it meets the requirements of subparagraphs (A)-(K). The paragraph does not say when the Administrator "shall disapprove" a plan or portions of a plan, although a reasonable implication of the language, and the one advanced by petitioners, might be that he "shall disapprove" when he finds that any of the listed requirements is not met.[10]

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[10] Petitioners cite several cases which, they claim, hold that the Administrator must disapprove a plan (or portion thereof) that is deficient in any respect. They rely most heavily on *Train v. NRDC*. In that case, however, the Supreme Court "held" only that the Administrator must *approve* a plan that meets all the requirements of § 110(a)(2). 421 U.S. at 79, 95 S.Ct. at 1481-82. The one Fifth Circuit case which petitioners say has decided this issue is irrele-

The language does not expressly give the Administrator the option of "conditional approval"—finding that all the

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vant. *See United States Steel Corp. v. USEPA*, 595 F.2d 207, 216 (simply paraphrasing the statutory language in dictum), *clarified*, 598 F.2d 915 (5th Cir. 1979). Petitioners' reliance on *NRDC v. EPA*, 478 F.2d 875, 888 (1st Cir. 1973), is curious, since the result reached in the part of the opinion cited was disapproved by the Supreme Court in *Train v. NRDC*, 421 U.S. at 87, 91-94, 95 S.Ct. at 1485, 1487-89. In *NRDC v. EPA*, 475 F.2d 968 (D.C. Cir. 1973), the D.C. Circuit did hold that the Administrator had acted improperly in allowing several states to delay submission of the transportation control provisions required by § 110(a)(2)(B) and in granting these states extensions for attainment of the national primary standards. *Id.* at 970. In the case before us, however, the Administrator has not given any extension for attainment of the primary standards (except that specifically authorized by § 172 (a)(2), 42 U.S.C. § 7502(a)(2)), nor has he allowed Texas to delay submission of a required element of its plan. Rather, Texas has submitted a plan which includes all the provisions required, and the Administrator has simply required changes in some of the provisions submitted. Moreover, the D.C. Circuit did not order the Administrator to immediately promulgate transportation control plans; instead, the primary remedy it devised was quite like the EPA's own conditional approval policy, giving the states a short period to make additional submissions while holding the states to the attainment deadlines. *See id.* at 970-71.

More to the point, we think, is *Friends of the Earth v. USEPA*, 499 F.2d 1118 (2d Cir. 1974), in which the Second Circuit upheld an EPA policy quite like "conditional approval." Although New York's transportation control plan did not contain detailed regulations, the EPA approved it on the state's assurance that more detail would be provided later. The court held:

> So long as the plan is detailed enough that the Administrator can determine that the proposed strategies will achieve national air quality standards and there is no reason to believe that the delay in promulgating detailed regulations would interfere with the requirement that such standards be achieved "as expeditiously as practicable," § 110(a)(2)(A)(i), we see no good reason not to allow a state some additional time to submit more specific details of their implementation plan.

Id. at 1124. Like the "conditional approval" policy, the policy at issue in *Friends of the Earth* required "sufficient commitment and detail" in the initial submission to ensure that the air quality standards would be attained. *Id.*

requirements are not met, but approving the plan on the condition that they will be met in the future. On the other hand, the paragraph does not expressly direct the Administrator to disapprove the plan if a requirement is not met.

One of the requirements of a plan which the Administrator "shall approve" under paragraph (2) is that

> it provide[] for revision . . . of such plan . . . (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977.

CAA § 110(a)(2)(H), 42 U.S.C. § 7410(a)(2)(H). This language does not expressly grant the Administrator the power to require revisions to a plan in lieu of approval or disapproval. By its terms, subparagraph (H) does no more than specify one of the provisions to be included in a SIP. *See Train v. NRDC*, 421 U.S. at 98, 95 S.Ct. at 1490. It is not in itself a qualification of the Administrator's duty to "approve or disapprove." Nevertheless, it does imply that the Administrator has the power to require revisions under certain circumstances.

The parties differ on whether this implied power to require revisions has any application to the approval-disapproval process. Petitioners argue that subparagraph (H) applies only when the Administrator finds that a previously approved plan is now "substantially inadequate"; the EPA argues that it also applies when the Administrator finds that a plan submitted for approval is found lacking. The language of subparagraph (H) does not expressly rule out either possibility. Moreover, the legislative history demonstrates that Congress deleted language that would have expressly limited this provision

to previously approved plans.[11] If the Administrator has the implied power under subparagraph (H) to require revisions in a plan submitted for approval, the EPA argues, the Administrator may "approve" the plan on the ground that, since the plan provides for adoption of revisions when he requires them, he may assume that the state will indeed revise the plan as required.

While we hesitate to find a qualification of the duty to "approve or disapprove" in a subparagraph that simply specifies one of the many provisions which an approved plan must contain, there is more language concerning the Administrator's power to suggest revisions in subsection (c) of § 110. Paragraph (1) directs the Administrator to

> "promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, if—
>
> (A) the State fails to submit an implementation plan which meets the requirements of this section,

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[11] Section 110 comes from the Senate version of the 1970 statute. As reported out of committee, the section contained a provision expressly granting the Administrator the power to revise a plan whenever he found, on the basis of "any information . . . made available to him," that "an *approved or promulgated* implementation plan will be, or has been, substantially inadequate to achieve national ambient air quality standards." S. 4358, sec. 6, § 111(e)(1), *in* S. Rep. No. 1196, 91st Cong., 2d Sess. 89 (1970) (emphasis added). This provision was approved by the Senate. *See* 116 Cong. Rec. 33118-19 (1970) ("adopting" House bill, but striking everything after the enacting clause and substituting the Senate bill in its place). The confeernce committee moved this language from what would have been subsection (e) of § 110 to its present location at (a)(2)(H), deleting the words "approved or promulgated" in the process. *See* H.R. Conf. Rep. No. 1783, 91st Cong., 2d Sess. 7 (1970). No explanation was given for this change either in the conference report, *see id.* at 45, or on the floor of Congress. It is clear, however, that Congress rejected an opportunity to restrict the revision process to "approved or promulgated" plans.

(B) the plan, or any portion thereof, . . . is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, *to revise* an implementation plan *as required pursuant to a provision* of its plan *referred to in subsection (a)(2)(H)* of this section.

CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1) (emphasis added). Thus, paragraph (1) requires proposed regulations in three instances: (A) failure to submit a plan; (B) failure to submit an acceptable plan; (C) failure to revise when notified by the Administrator. The EPA argues that subparagraph (C) creates an exception to the Administrator's duty to impose an implementation plan under paragraph (1) whenever he has required the state to revise its plan. We have some difficulty with this interpretation: by its terms, subparagraph (C) is an additional command that the Administrator shall proposed a plan, not an exception to the commands given in subparagraphs (A) and (B). Moreover, reading subparagraph (C) as an exception allowing the Administrator to wait until "60 days after notification . . . or [for] *such longer period as he may prescribe*" before proposing regulations would give the Administrator the power to circumvent all of the deadlines expressly prescribed by Congress in § 110.

Petitioners argue that interpreting the revision provisions of (a)(2)(H) and (c)(1)(C) as applying only to previously approved plans would be more consistent with the (a)(2) requirement that the Administrator "approve or disapprove" and with the deadlines contained in (a)(2) and (c)(1). We thing that petitioners' interpretation is a reasonable one. If the EPA had adopted it, we would uphold it. The issue, however, is not whether petitioner's

interpretation is reasonable, but whether the EPA's interpretation is "plainly unreasonable." *Lead Industries Association, Inc. v. EPA*, 647 F.2d at 1147. We cannot say with any assurance that the EPA's interpretation is incorrect. While § 110 specifies when the Administrator "shall approve," it nowhere prescribes when the Administrator "shall disapprove." The section impliedly grants the Administrator authority to require revisions in SIPs, and it does not expressly rule out the use of the revision authority in the approval-disapproval process. Finally, subsection (c) (1) (C) does give the Administrator the discretion, once he has invoked his revision authority, to give a state "such longer period as he may prescribe" to make the revisions needed to bring the plan into compliance. While we certainly would not conclude that the EPA's interpretation is the only permissible reading of § 110, *see Train v. NRDC*, 421 U.S. at 75, 95 S.Ct. at 1479, we think that it does have support in the language of the statute.

Moreover, important policy considerations support the EPA's interpretation. One of the central purposes of the Clean Air Act was to place the "primary responsibility" for assuring air quality on the states. CAA § 107(a), 42 U.S.C. § 7407(a); *see Train v. NRDC*, 421 U.S. at 64-65, 79-80, 86-87, 95 S.Ct. at 1474-75, 1481-82, 1485. It would be inconsistent with this purpose to hold that the EPA must mechanically disapprove a state's SIP revisions even though the revisions "substantially comply" with the statute. This is especially so when the statutory language gives at best uncertain guidance as to precisely what it required. In these circumstances, we find it unlikely that Congress intended the imposition of a federal plan to be preferred to a commitment by the state to make the needed modifications.

Furthermore, we think that the EPA's interpretation gives the agency a minimal amount of needed flexibility in enforcing the statutory deadlines. Under peti-

tioners' reading of § 110, if the state timely performed its duty by submitting its revisions on January 1, and the EPA timely performed its duty of disapproving the plan on May 1, the Administrator would have two months to prepare and publish a proposed implementation plan, give the public an adequate opportunity for comment and consider all comment received,[12] arrange, give notice of, and hold a public hearing on the plan it has proposed,[13] and promulgate the final plan. CAA § 110(c)(1), 42 U.S.C. § 7410(c)(1). While we believe that Congress intended the deadlines to be enforced, we do not think that Congress ruled out, the possibility that SIP revisions submitted before the final deadline of July 1, 1979, could be "conditionally approved" if they were in substantial compliance with the Act's requirements. *See Friends of the Earth v. USEPA*, 499 F.2d 1118, 1124 (2d Cir. 1974) (Administrator could fully approve SIP and give state additional time to provide needed details to long as state gave adequate commitment and detail to ensure attainment of air quality standards).

In sum, we think that the EPA reasonably concluded that conditional approval was consistent with the Act. The "heart" of the 1977 Amendments is that the SIP re-

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[12] *See United States Steel Corp. v. USEPA*, 595 F.2d 207, 213-14 (5th Cir. 1979) (holding, in effect, that EPA must follow APA procedures, even if violation of statutory deadlines results), *clarified on other grounds*, 598 F.2d 915 (5th Cir. 1979).

[13] Section 110(c)(1) provides that, if the state "held no public hearing associated with respect to [the] plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." 42 U.S.C. § 7410(c)(1). While the statute does not expressly require the Administrator to hold a hearing if the state has held one, and therefore a court could not order one to be held, *see Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978), fairness would seem to require the agency to hold a public hearing if the Administrator's proposal bore little resemblance to the state's proposal.

visions "shall provide for attainment of each . . . national ambient air quality standard in each [nonattainment] area as expeditiously as practicable, but in the case of national primary ambient air quality standards, not later than December 31, 1982," CAA § 172(a)(1), 42 U.S.C. § 7502(a)(1). *Cf. Train v. NRDC*, 421 U.S. at 66-67, 95 S.Ct. at 1475 (discussing 1970 Amendments). "Conditional approval" is neither an exemption from this condition nor an extension of the statute's deadlines; instead, it is a conclusion that, if minor changes are made, the statute's principal condition and deadlines will be met. When the statute's ultimate goal can be met as well by state "revision" as by EPA "promulgation," we think that the EPA can reasonably choose to employ the former; after all, it is not "promulgation" of a plan that will clear the air, but state implementation of whatever plan is devised.[14]

Accordingly, we hold that the EPA's conditional approval policy was a reasonable interpretation of the statute.

C. *Propriety of Granting Conditional Approval to the Texas SIP Revisions*

Petitioners argue that, even if conditional approval is permissible under § 110, it should not have been granted to the Texas SIP revisions. First, petitioners point out that the conditional approval was not granted until March 25, 1980. The argue that the EPA should not be able to

[14] We think that this reality militates with even greater force against a court order to promulgate a plan at this time, when all of the dates for fulfilling the conditions have passed, *see* 44 Fed. Reg. 45204 (1979), and when the EPA is in the process of granting full approval to the conditionally approved portions of the state's plan, *see* 46 Fed. Reg. 35642 (July 10, 1981) (granting full approval to certain conditionally approved parts of plan); 46 Fed. Reg. 30366, 30367 (June 8, 1981) (proposing full approval of the plan provisions concerning total suspended particulate, discussed in section III.E. *infra*).

invoke the exception created by § 110(c)(1)(C) after expiration of the July 1, 1979 deadline for promulgation of an implementation plan otherwise imposed by § 110 (c)(1).

Section 110(c)(1) requires the Administrator to promulgate an implementation plan or revision "unless, prior to such promulgation, such state *has adopted* and *submitted* a plan (or *revision*) *which the Administrator determines* to be in accordance with the requirements of this section." 42 U.S.C. § 7410(c)(1) (emphasis added). The use of the words "has adopted and submitted" make clear that the state must adopt and submit the plan or revision before the promulgation deadline; the tense of the word "determines" indicates that the Administrator need not have made his determination by the same deadline. Congress' use of different tenses can be interpreted as a recognition that the Administrator would need a reasonable time to pass on the state's submission.

Texas did "adopt and submit" its SIP revisions on April 13, 1979, before the July 1 deadline (*i.e.*, six months after the state plan was due on January 1). On August 1, only one month after the deadline, the Administrator proposed conditional approval. Additional time was needed to work out the final conditions and schedule after notice and comment had been received. Petitioner has not shown that the time taken was unreasonable.

As we have explained above, conditional approval is in essence a determination that the requirements of the statute have been met. Therefore, the state did "adopt and submit" a SIP revision which the Administrator determined, within a reasonable period, to be in accordance with the statutory requirements. The EPA's failure to promulgate Part D revisions for the state did not violate § 110.

Petitioners also argue that the Texas plan revisions did not satisfy the EPA's own criteria for conditional ap-

proval because the deficiencies were not "minor" and they were not required to be corrected with a "short" time. *See* 44 Fed. Reg. 38583 (1979). Petitioners' contention that the deficiencies were not minor rests on their challenges to the substance of many portions of the state's plan; since we devote the remainder of this opinion to rejecting those challenges, we think the EPA reasonably concluded that the deficiences were minor. We also think that the state committed itself to making corrections within a reasonably "short" time: in its March 25, 1980 notice the EPA gave the state until August 1, 1980, to fulfill most of the conditions the agency set. Petitioners have not shown that this period was not "short"; they have not argued, for example, that the amount of time given would prevent the plan from providing for attainment of the air quality standards within the statutory deadlines.

Accordingly, we uphold the Administrator's grant of conditional approval to portions of the state's Part D revisions.

III. *Challenges to the Substance of the Texas Part D Revisions*

A. *Scope of Review*

We are met at the outset by two unsupported contentions concerning the scope of our review. Petitioners say that we should apply the standard of review applicable to agency adjudication, and set aside the EPA's determinations if they are not supported by substantial evidence in the record. *See* 5 U.S.C. §§ 554, 556, 557, 706(2)(E). The respondents also adopt the adjudicatory theme, arguing that petitioners should not be permitted to raise on appeal any argument that was not raised during the "notice and comment" period.

The source of both contentions is the type of action taken by the agency in this case. The Administrator's determinations concerning implementation plans are des-

signated as "rules" by the statute and the agency, and the procedures employed in their formulation are the rulemaking procedures of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553.[15] The rulemaking procedure is appropriate since the formulation of an implementation plan is in large part a legislative, policy-making task, committed in the first instance to the state and disapproved by the EPA only if it fails to meet the statutory requirements, *see Train v. NRDC*, 421 U.S. at 65, 79, 95 S.Ct. at 1475, 1482; *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981). In deciding whether a particular state's plan satisfies the statutory requirements, however, the EPA must at many points make factual determinations.

Despite these factual components, neither the Supreme Court nor this court has abandoned the "arbitrary or capricious" standard of review; both have rejected the "substantial evidence" rule, primarily because the agency's procedures are "not designed to produce a record that is to be the basis of" the factual determinations. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L. Ed. 2d 136 (1976), *followed in Texas v. EPA*, 499 F.2d 289, 296 & n.7 (5th Cir. 1974) (review of EPA action on original Texas SIP), cert. *denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976). At the same time, however, the courts have begun to realize that they sometimes cannot say whether a factual determination is 'arbitrary or capricious" unless they know the basis for the facts found. *See Overton*

[15] We note that in the 1977 Amendments, Congress removed much of the EPA's rulemaking from the provisions of the APA by adding a new subsection (d) to § 307. Pub. L. No. 95-95 § 305(a), 91 Stat. 685 (codified at 42 U.S.C. § 7607(d)). The statutory language and its legislative history make clear, however, that § 307(d) does not apply to the approval or disapproval of implementation plans. *See* H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess. 177 (1977). Thus, the approval process remains under the APA procedures.

Park, 401 U.S. at 416, 91 S.Ct. at 824 (court's "inquiry into the facts is to be searching and careful"); *id.* at 420, 91 S.Ct. at 825-26 (suggesting that an inquiry into decisionmakers' mental processes may be appropriate when facts relied on are not in the agency record); *Texas v. EPA*, 499 F.2d at 297 ("Only by our own study of the record can we resolve the factual disputes between the parties . . . ."); 1 K. Davis, Administrative Law § 6:13 (2d ed. 1978).

Despite their recognition of the concept that, to be reasonable, a factual determination must have evidence to substantiate it, the courts have had difficulties applying the concept to "informal" agency action. These difficulties relate primarily to the nature of the decisions made and the records on which they are made. The difficulties are particularly acute in this case. First, is hard to separate the "factual" components of the SIP-approval process from its "policy-making" components.[16] *Cf.* 1 K. Davis, *supra*, § 6:13, at 510 ("The problem area . . . is the area in which facts and policy thinking are mixed together in such a way that the factual ingredient of the rules is hard to identify."). Moreover, the ultimate question to be resolved by the agency—whether the plan submitted will "provide for" attainment of the national standards by specified future dates, *see* CAA §§ 110(a)(1), 172(a)(1), 42 U.S.C. §§ 7410(a)(1), 7502(a)(1)—is one which cannot be substantiated by proof positive, but is inherently a predictive one. *Cf. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814, 98 S.Ct. 2096, 2121, 56 L.Ed.2d 697 (1978) (when rule is based in part on a prediction "complete factual support . . . is not possible or required").

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[16] For example, § 172(b)(2) requires that a Part D revision "provide for implementation of all reasonably available control measures as expeditiously as practicable." 42 U.S.C. § 7502(b)(2). Is what is "*reasonably* available" a factual determination or a policy choice? Or does the determination have both factual and policy elements?

Our second difficulty is the record of the Part D revision process. It consists mainly of documents exchanged by the state and the EPA which, in essence, state the baseline levels of air pollution, project increases in air pollution if the problems are left uncontrolled, predict reductions if certain measures are taken, and then compare the final levels calculated with the national standards the EPA has promulgated. All of this material is based on many previous decisions of the EPA concerning the state's original implementation plan, the "reasonable availability" of various techniques, the validity of certain computer models and mathematical computations, and the reliability of the data used in the computations. Few if any of the decisions and assumptions underlying the SIP's predictions are contained or explained in the record.

Against this background, we are presented, in one of petitioners' many points of error, with a laundry list of the requirements of § 172, 42 U.S.C. § 7502, each accompanied by the naked assertion that there is no evidence to support the agency's conclusion that the requirement has been met. Petitioners have not even specified what facts they believe the agency was required to find. Thus, without any specific objection to the agency's determination, petitioners would put the agency and the court to the arduous task of explaining every step in a decade-spanning, technical and complicated decisional process. We think that petitioners must do more than this to merit review of their contentions. *Cf. Citizens for a Better Environment v. USEPA*, 649 F.2d 522, 529 (7th Cir. 1981) (when petitioners claim that all "reasonably available control measures" have not been implemented without identifying the measures not implemented, their challenge amounts to "paper pleadings").

Without rejecting the possible applicability of the principle that evidence must substantiate the factual components of "informal" agency action, we reaffirm that the basic standard of review is the "arbitrary or capricious"

standard. *See Texas v. EPA*, 499 F.2d at 296. Accordingly, petitioners must at least articulate some reason why the agency's actions may be arbitrary or capricious. *See Alabama Nursing Home Association v. Harris*, 617 F.2d 388, 393 (5th Cir. 1980) (agency action is presumed valid, and petitioners have the burden of showing the agency's error). When petitioners claim that an agency conclusion was arbitrary because there was no evidence to support it, they must at least identify the factual determination the agency was required to make and their basis for disputing it, bringing the countervailing evidence, if any, to the attention of the court. *See Texas v. EPA*, 499 F.2d at 297 (court must generally restrict itself to parties' references to the record). When the parties have identified a legitimate factual dispute that cannot be resolved by the court on the rulemaking record, they may be permitted to supplement the bare record with background information and explanations of methodology which, often from practical necessity, are not included in the particular rulemaking file. *See Overton Park*, 401 U.S. at 420, 91 S.Ct. at 825 (dictum); *Texas v. EPA*, 499 F.2d at 319 (allowing explanatory documents into the record). But petitioners cannot expect the reviewing court to identify the factual disputes for them.

Accordingly, we have limited our review of petitioners' conclusory assertions that there is "no evidence" that the requirements of § 172 have been met to determining that the agency did indeed conclude that the requirements were met. In the sections that follow we give fuller review to petitioners' specific objections to the EPA's actions.

Just as we cannot fully accept petitioners' adjudicatory analogy, we cannot accept the EPA's argument that petitioners should be barred from raising any objection not raised during the "notice and comment" period. The EPA made the same argument in a case it has failed to cite to us, and the argument was rejected by Judge Hill, then a district judge. *Dobbs v. Train*, 409 F. Supp. 432, 434-

35 (N.D. Ga. 1975), *aff'd sub nom. Dobbs v. Costle*, 559 F.2d 946 (5th Cir. 1977). While *Dobbs* was an action to review an agency denial of benefits pursuant to the challenged rule, and this action is one for direct review, we agree with Judge Hill that the courts should not generally hold a petitioner estopped from objecting to an agency rule because his specific objection was not made during the "notice and comment" period.[17] The rule urged by EPA would require everone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.[18] This is a fate this court will impose on no one.[19]

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[17] The EPA has cited no authority for the proposition that an argument not raised during the comment period may not be raised on review. The agency's reliance on *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54 (1952) and *Merchants Fast Motor Lines, Inc. v. ICC*, 528 F.2d 1042 (5th Cir. 1976), is badly misplaced. Each case involved a challenge to ICC action by a party who participated in a hearing at which evidence was taken and findings were made on the record, and who had an opportunity to appeal the hearing officer's decision to the Commission itself.

Our own research has uncovered one case lending some support to the proposition that a party may be estopped from raising an argument on direct review if he failed to raise it during the rulemaking proceeding. *Gage v. AEC*, 479 F.2d 1214, 1217-19 (D.C. Cir. 1973). *Gage*, however, involved a statute entitling interested persons to become "parties" and get a "hearing" on their objections, and granting the right of direct review only to such "parties." In the case before us, there are no comparable statutory provisions or limitations. *See* note 19 *infra*.

[18] A petitioner generally has no right to demand an additional period for comments when the rule promulgated differs from the rule proposed as a result of comments tendered during the rulemaking proceeding. *See* 1 K. Davis, *supra*, § 6:25, at 574-76 (summarizing cases).

[19] We note that Congress has attempted to impose such a fate, albeit with some escape clauses, in § 307(d)(7)(B) of the Clean

The nature of petitioners objections make this a particularly inappropriate case for estoppel. Petitioners claim that the EPA improperly determined that various requirements of the statute are met. Since the EPA is required by statute to make these determinations in approving or disapproving a state plan, we do not think that petitioners needed to notify the agency that it had acted arbitrarily. The statute gave it sufficient notice that it must make reasoned determinations.[30]

Having determined the scope of our review, we turn to petitioners' specific objections to the EPA's actions.

B. *Alternatives Analysis*

Section 172 of the Act, 42 U.S.C. § 7502, lists the provisions required in every nonattainment plan. That section also contains several special provisions that must be included for any nonattainment area which, like Harris County, cannot meet the primary standards for certain pollutants by December 31, 1982, and receives an extension for attaining them up to December 31, 1978. The section provides that such a plan

> shall . . . establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the pro-

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Air Act, 42 U.S.C. § 7607(d)(7)(B). The EPA concedes, however, that § 307(d) does not apply to the approval or disapproval of implementation plans. *See* note 15 *supra*.

[30] Moreover, we find many of the EPA's claims that it was unaware of petitioners' objections to be disingenuous. It is clear that the EPA was aware of the legal delicacy of its conditional approval policy, and any claim that the agency was not "aware" that the statute passed by Texas might not provide legal authority to implement an inspection and maintenance program, *see* section III.C. *infra*, rings false.

> posed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification[.]

CAA § 172(b)(11)(A), 42 U.S.C. § 7502(b)(11)(A). Petitioners point out that the only provision in the Texas plan that purports to satisfy this requirement simply states that the TACB's construction permit application form "is being amended to require the appellant to respond as to whether or not an alternate site analysis has been performed." Petitioners argue that this provision does not comply with the statute because it does not "require" any analysis at all: there is no provision for informing the applicant of what the "analysis" is or what it requires; there is no provision indicating that the state will review the applicant's analysis to ensure, for example, that it does indeed "demonstrate that benefits of the proposed source significantly outweigh i[ts] environmental and social costs"; there is no provision even indicating that a negatice answer to the proposed question will result in rejection of the application. Therefore, petitioners contend, the proposed "check-off box" is not even a "program," much less a program that satisfies the requirements of the statute.

The EPA fully approved this portion of the SIP after the TACB "ha[d] provided a written commitment to inform applicants who do not perform the required analyses that a permit meeting federal requirements cannot be issued." 45 Fed. Reg. 19231, 19232-33 (1980). While this "commitment" leaves the SIP with no indication of what sort of analysis is required, it does establish a basis for the EPA to believe that something would be required. The EPA argues that the details of this "something" are unimportant: it argues that § 172(a)(2) requires only that it determine that the provisions of the plan "provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which [an extension is given] as expeditiously as prac-

ticable but not later than December 31, 1987." 42 U.S.C. § 7502(a)(2). As long as it makes this determination, the EPA argues, the details of the "program" required by subsection (b)(11)(A), 42 U.S.C. § 7502(b)(11)(A), are unimportant.

We hesitate to accept the EPA's argument in full: while we agree that the Act generally leaves the states with considerable latitude in determining how its requirements will be met, *see Train v. NRDC, Inc.*, 421 U.S. at 87, 95 S.Ct. at 1485, and that therefore there is no inflexible "alternatives analysis program" imposed by § 172(b)(11)(A), we assume that when Congress outlined the general elements and purpose of such a program, it intended the states to establish programs which incorporated those elements and achieved that purpose. When Congress required the "alternative analysis program" to be part of any plan which received an extension under subsection (a)(2), it undoubtedly intended that such a program would have to be part of the plan if the state was to demonstrate that it could not meet the statutory deadlines "despite the implementation of *all* reasonably available measures" but that it had nevertheless come up with a plan that would attain the primary standards "as expeditiously as practicable." 42 U.S.C. § 7502(a)(2) (emphasis added). Thus, we must determine whether the state has established some program that provides for the sort of alternatives analysis described by the statute.

The analysis required by the statute must "demonstrate[] that benefits of the proposed source significantly outweigh [its] environmental and social costs." The statute does not indicate what sort of "benefits" should be considered, but obviously the benefits must be economic and social ones: construction of a "major emitting facility" will rarely result in environmental benefits. The Act, however, gives no indication of how economic and social benefits may be compared to environmental and social costs.

The state of Texas argues that it has a program of analysis that essentially satisfies the requirements of (b)(11)(A): under the Texas Clean Air Act, a permit applicant must demonstrate to the TACB that its proposed facility will not "contravene the intent of the Texas Clean Air Act" or the standards established by § 3.27 of the Act. Tex. Rev. Civ. Stat. Ann. art. 4477-5, § 3.27(c) (Vernon's Supp. 1981). This procedure, the state argues, requires a demonstration that the proposed facility will not impose unacceptable environmental costs without "diluting" the inquiry by permitting consideration of economic benefits. Furthermore, the state points out, its rules do not simply require an "analysis" of "alternative . . . environmental control techniques"; they require sources subject to (b)(11)(A) to achieve the "lowest achievable emission rate."[21] As for the required "analysis" of "alternative sites, sizes, and production processes," the state argues that its assurances to the EPA concerning "enforcement" of the application form requirement, combined with its existing application program, are enough to satisfy (b)(11)(A)'s broad requirements.

While we find it difficult to say that the components of the Texas program correspond precisely to the terms of the statute, we find it equally difficult to say that the demonstration that Texas requires of permit applicants does not meet the essential concerns of (b)(11)(A). Since Texas has committed not to issue "permit[s] meeting federal requirements" if the alternative analysis is not done, and since operation of a new facility without

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[21] This requirement is not one of the state's own devise, but is instead required by another section of Part D itself. CAA § 173(2), 42 U.S.C. § 7503(2). Nevertheless, the requirement that the permit applicant demonstrate compliance with the lowest achievable emission rate inherently requires an analysis of alternative control techniques. *See* CAA § 171(3), 42 U.S.C. § 7501(3) (defining "lowest achievable emission rate").

such a permit would violate the implementation plan, *see* § 172(b)(6), 42 U.S.C. § 7502(b)(6), the EPA would be able to bring an enforcement action against the owner or operator of such a facility. *See* CAA §§ 113, 42 U.S.C. § 7413. Moreover, if the EPA should in the future give a more definitive interpretation of the alternative analysis program required by § 172(b)(11)(B), it may require Texas to revise its SIP. *See* CAA §§ 178, 108(c), 110(a)(2)(H)(ii), 42 U.S.C. §§ 7508, 7408(c), 7410(a)(2)(H)(ii). If we were to set aside the alternatives analysis portion of the Texas plan, it would be simply because we have played a match game with paper terms and found a few terms missing. The EPA has determined that the Texas alternatives program is sufficient and, more importantly, that the entire Texas plan is sufficient to attain the primary standards "as expeditiously as practicable." Because Texas does have a program requiring a demonstration concerning a proposed facility's environmental costs, and because Texas has assured the EPA that the state will inform any applicant who does not perform the required analysis that its operation will not be in compliance with the Clean Air Act, we cannot say that the EPA's approval of the state's alternatives analysis program was arbitrary, capricious, or an abuse of discretion.

C. *Inspection and Maintenance Program*

Petitioners challenge the EPA's full approval of the provisions in the Texas SIP for an automobile inspection and maintenance program in Harris County. 45 Fed. Reg. 74830 1979. These provisions became necessary when the state asked for and received an extension for attainment of the ozone standard in Harris County past the December 31, 1982 deadline. *See* CAA § 172(a)(2), (b)(11), 42 U.S.C. § 7502(a)(2), (b)(11). The provisions were included pursuant to § 172(b)(11)(B) which requires that

> the plan provisions . . . shall . . . establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program[].

42 U.S.C. § 7502(b)(11)(B). The arguments of the parties reflect confusion and disagreement concerning exactly what (b)(11)(B) requires, without any attempt to squarely address the issue.

The petitioners assert that, when read together with the § 172 requirements (1) that the state demonstrate that it has "*implement*[*ed*] . . . all reasonably available measures" and that it has provided for attainment of the primary standards "as expeditiously as practicable," 42 U.S.C. § 7502(a)(2) (emphasis added), and (2) that the plan "include written evidence" that the legislature has adopted the "necessary . . . schedules" and that the state is "committed to *implement* and *enforce* the appropriate elements of the plan," *id.* § 7502(b)(10) (emphasis added), the language of (b)(11)(B) must require that the state submit evidence that the legislature has adopted a law which implements *mandatory* inspection and maintenance programs. Intervenor Texas disagrees, arguing that (b)(11)(B), by its very terms, requires no more than a "*schedule* for implementation of a . . . program." The statute says nothing about the nature of the program to be scheduled, and does not expressly require the program to be mandatory. In its brief, the EPA apparently[22] adopts petitioners' interpretation of the statutory requirements, but argues that legislation adopted by the state provides adequate authority to implement a mandatory inspection and maintenance program.

The EPA's position concerning the Texas legislation is untenable. While the Texas statute does direct the TACB to devise a "schedule" for implementation of an inspection and maintenance program, it does not authorize the

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[22] We say "apparently" because the EPA does its best not to articulate any clear position on the issue.

TACB, or anyone else, to implement the schedule devised. Furthermore, the Texas legislation does not require the program "scheduled" to be mandatory.[23]

Thus, if we accepted the interpretation of § 172(b)(11)(B) adopted by the EPA in its brief, we would hold the agency's approval of the inspection and maintenance portion of the SIP revisions to be arbitrary and capricious. The interests of intervenor Texas, however, are also at stake in this action. Indeed, the relief requested by petitioners—an order that the Texas plan be disapproved and an inspection and maintenance program imposed upon the state—would affect the state most directly. Because we are not at all sure what the statute requires, and because we believe the EPA has never given an unambiguous interpretation of it, we take an independent look at the statute and its legislative history.

The statute, by its terms, requires nothing more than a schedule. While we agree that Congress must have intended something more than a hypothetical inspection and maintenance program, we also believe that Congress did not intend § 172(b)(11)(B) to be a self-executing requirement that the state implement an inspection and maintenance program; indeed, in passing the 1977 Amendments, Congress rejected such a provision.[24] Instead, we think that Congress used the word

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[23] *See* Tex. Rev. Civ. Stat. Ann. art. 4477-5, § 3.30(d) (Vernon's Supp. 1981). The EPA assumes that, unless the Texas legislature takes further action to "amend" the statute, the schedule devised by the TACB will go into effect. There is simply no basis for this assumption in the statute. Moreover, the state itself does not endorse the EPA's interpretation.

[24] The House version of the 1977 Amendments, as reported out of committee, required a mandatory inspection and maintenance program in areas, such as Harris County, that were exceeding the national primary standards for carbon monoxide or ozone. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 20-21, 281-91, *reprinted in* [1977] U.S. Code Cong. & Ad. News 1077, 1098, 1360-70. The provision of the House bill requiring mandatory inspection and main-

"schedule" for a specific purpose: it intended the statutory language itself to require only that the revisions submitted prior to 1979 establish a "schedule," in order to give the state sufficient lead time prior to implementation of the program. It intended an enforceable program to be put in place by additional SIP revisions required to be submitted in 1982. The 1977 Amendments require any state that receives an extension pursuant to § 172(a)(2) to "adopt and submit to the Administrator a plan revision before July 1, 1982." Pub. L. No. 95-95 § 129(c), 91 Stat. 685 *as amended by* Pub. L. No. 95-190 § 14(b)(4), 91 Stat. 1393 (see note under 42 U.S.C. § 7502). This revision must "contain *enforceable* measures to assure attainment of the applicable standard not later than December 31, 1987." CAA § 172(c), 42 U.S.C. § 7502(c) (emphasis added). If Congress had intended the state's 1979 submission to contain an enforceable inspection and maintenance program, then the provision for an additional submission containing "enforceable measures" in 1982 would have been unnecessary.

We think that the deferment of submission of "enforceable" measures until July 1, 1982, combined with the requirement of only a "schedule" in the 1979 submission, indicates congressional recognition that a state might not have been able to devise, and therefore might not have been able to authorize the implementation of, an inspection and maintenance program by July 1, 1979. This recognition is reflected in the legislative history. Section 172 comes from the Senate version of the 1977 Amendments. *See* S. Rep. No. 127, 95th Cong., 1st Sess. 154-56 (1977) (originally designated as § 110(h)(1)-(3)). In discussing the requirements of § 172, the committee does clearly state that an inspection and main-

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tenance, however, was not adopted by Congress. We find it rather curious that the only legislative history the EPA relies on for its interpretation of § 172(b)(11)(B) in this litigation is the House Report's discussion of this provision. *See* Brief for Respondent at 4.

tenance program "is a precondition for extension of deadlines for attainment of oxident and carbon monoxide standards beyond 1982." *Id.* at 40. The committee also makes clear, however, that the 1979 and 1982 submissions serve different purposes:

> The bill requires that plans submitted by January 1, 1979, must provide for implementation of all *reasonably available* control measures as quickly as possible. States with regions in which reasonable measures will not provide for attainment of a standard by July 1, 1982, must *identify* in the 1979 plan submission additional measures *which would be needed* to attain standards no later than July 1, 1987. The additional measures identified may not be deemed reasonable, and the State *need not make a commitment at the time the plan is submitted* to implement them. For example, gas rationing may be identified as ultimately necessary to attain standards, but this is not currently a reasonable measure.

Id. at 39 (emphasis added). Thus, in the 1979 submission, the state need only commit to implementing "reasonably available" measures. The committee goes on to describe such measures:

> In determining whether a measure is reasonable, a State or the Administrator must consider the time provided for implementation. For example, a vehicle inspection and maintenance program *may not be reasonably available by mid-1978 or 1979.* There may be a need for lead time to train mechanics, build faciilties and educate the public. The program would, however, be reasonable if sufficient lead time is allowed to phase it in. The bill makes clear that an inspection and maintenance program is a reasonable measure.

Id. at 40 (emphasis added). Reading the words of the statute along with this legislative history leads us to

conclude that Congress did not intend to require an "enforceable" inspection and maintenance program until the 1982 submission unless, prior to that time, the EPA had determined that the implementation of such a program was a "reasonably available" measure.

The EPA, to our knowledge, has never made an unambiguous determination that an inspection and maintenance program is a "reasonably available" measure, either generally or in the state of Texas. Petitioners and the EPA cite two policy statements issued by the agency in which, they say, the agency has interpreted § 172 as requiring each state to submit legislation with its 1979 Part D revisions, not merely scheduling the implementation of a program in nonattainment areas, but actually implementing a mandatory program of inspection and maintenance. *See* 43 Fed. Reg. 21673, 21676 (1978) ("Criteria for Proposing Approval of Revision to Plans for Nonattainment"); 44 Fed. Reg. 20372 (1979) ("General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas"). We find these policy statements rather ambiguous. When the EPA has specified in the policy statements precisely what sort of legislative approval is required to accompany the 1979 SIP revisions, it has consistently stated that the legislation must authorize an "inspection/maintenance program *or a schedule* endorsed by and committed to by the Governor for the development, adoption, and implementation of such a program as expeditiously as practicable." 43 Fed. Reg. at 21675; *see* 44 Fed. Reg. at 20375. Only in a supplementary comment to the 1979 policy statement did the EPA opine that the SIP revisions must be accompanied by legislation actually implementing a mandatory program.[25] Moreover, these policy

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[25] In a section following the "Basic Requirements" section of the 1979 notice, *see* 44 Fed. Reg. at 20374-75, entitled "Further Guidance," the EPA does state that

> the SIP must contain a commitment of the state, local government, or regional agency to implement the program as ex-

statements are not rules adopted in accordance with administrative rulemaking procedure; they are merely "interpretative rules" or "general statements of policy." *See* 5 U.S.C. § 553. We have some doubts whether a single comment in a somewhat inconsistent policy statement would be legally binding if the EPA rejected the state's SIP revision for failure to comply with that one statement. *Cf. Morton v. Ruiz*, 415 U.S. 199, 236-37, 94 S.Ct. 1055, 1075, 39 L.Ed.2d 270 (1974) (interpretive rule has no binding effect and is entitled to no deference when inconsistent with statutory intent).

In the absence of a clear statement from the EPA finding that inspection and maintenance is now "reasonably available," we prefer to read § 172(b)(9), (b)(11)(B), and (c) as they are written until the EPA provides a definitive rule. Together, (b)(9) and (b)(11)(B) require written evidence that the legislature has provided the legal authority to "establish a specific schedule for implementation" of an inspection and maintenance program. The state has provided such evidence.[26] Subsection (c) requires an enforceable program to be provided in the 1982 submission. If the EPA

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peditiously as practicable. EPA has determined that the final deadline for submitting assurances of *adequate legal authority to carry out* the program is June 30, 1979 . . . . Failure to submit by the required deadlines the legal authority and all regulatory requirements necessary for *mandatory* inspection and *mandatory* repair of failed vehicles will make the SIP no longer adequate to satisfy the requirements of Part D.

Id. at 20377 (emphasis added). Even this section is ambiguous, however, for it begins with the statement that the requirement is "[a]n acceptable inspection/maintenance program *or schedule*." *Id.*

[26] The Texas legislation directs the TACB to conduct a pilot program in Harris County, Tex. Rev. Civ. Stat. Ann. art. 4477-5, § 3.30(b) (Vernon's Supp. 1981), and, based on the results of the pilot program, to establish a schedule "to allow and achieve full implementation of [an] inspection and maintenance program as it affects passenger vehicles in Harris County not later than December 31, 1982," *id.* § 3.30(d)(1).

should, before that time, clearly determine that inspection and maintenance is "reasonably available," and that therefore the state's Part D revisions must include enabling legislation providing for immediate implementation of a program, it can, of course, inform the state of Texas that its SIP and its statute must be revised. *See* CAA § 110(a)(2)(H)(ii), (c)(1)(C), 42 U.S.C. § 7410(a)(2)(H)(ii), (c)(1)(C). In comparing the legislation Texas has passed and submitted in its 1979 revisions with the requirements of (b)(11)(B), however, we cannot say that the EPA's approval of the 1979 submission was arbitrary, capricious, or an abuse of discretion. Given the statutory language and the EPA's failure to determine that inspection and maintenance was "reasonably available," we think that such approval may have been required by the statute.

D. *The Urban/Rural Ozone Nonattainment Distinction*

In formulating the general criteria to be applied to all Part D SIPs, the EPA decided that "[a]lthough an ozone SIP must assure reasonable further progress and attainment in all nonattainment areas, the SIP need not include a specific demonstration of reasonable further progress and attainment in rural areas." 44 Fed. Reg. 20372, 20376 (1979). Instead, the agency decided, the SIP need only require the application of "reasonably available control technology" to all major sources of "volatile organic compounds" (VOC) in rural areas. The EPA reasoned that such controls, combined with specific demonstrations of attainment in urban areas, "should assure reasonable further progress and attainment in the rural areas by minimizing the pollutants transported from urbanized to rural areas." *Id.*

Petitioners argue that this exemption of rural areas from a specific demonstration of attainment contravenes the terms of Part D. The statute, however, does not expressly require a "demonstration of attainment" for each

area; it requires only that "the provisions of [the] plan . . . shall *provide* for attainment . . . in each [nonattainment] area." CAA § 172(a)(1), 42 U.S.C. § 7502(a)(1); *see* CAA § 110(a)(1), 42 U.S.C. § 7410(a)(1). If the EPA could reasonably determine that the controls it required for rural areas, along with the required demonstrations for urban areas, would "provide for" attainment, then its "exemption" was a proper interpretation of the Act.

The EPA's conclusion that ozone is primarily a rural problem is based on the chemical processes resulting in the formation of ozone. Ozone is created by a series of chemical reactions between "oxidant precursors" in the presence of sunlight. Final Rulemaking on National Standards for Photochemical Oxidants, 44 Fed. Reg. 8202, 8202 (1979). The two principal precursors are VOC and nitrogen oxides (NO_x). *Id.* Studies have shown that ambient NO_x is frequently below detectable levels in rural areas. Moreover, once it is formed, ozone can travel hundreds of miles. Thus, the EPA has concluded that the ozone present in rural areas often has its origins in urban areas. Attainment of the ozone standards in urban areas, the agency believes, will assure attainment in rural areas, especially if rural sources of VOC are adequately controlled.

We cannot say that the EPA's policy of distinguishing rural areas from urban areas is contrary to the statute or is arbitrary, capricious, or an abuse of discretion.[27]

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[27] In their reply brief, petitioners claim that they do not challenge the reasonableness of the EPA's policy in general. They do contend, however, that it is arbitrary and capricious to apply it to Galveston County. Petitioners argue in effect that the EPA was required to create an exception to its valid general policy because, they say, the EPA's own past studies have shown that NO_x "emission density" for Galveston and some other Texas counties designated as "rural" is comparable to that of "urban" Harris County. Petitioners cite two somewhat out-of-date studies and ask that they be added to the record in this case. We decline to do so for two

E. *Total Suspended Particulate Matter (TSP)*

In passing on the provisions of the Texas SIP dealing with Total Suspended Particulate (TSP), the EPA divided Texas into two sets of nonattainment areas. For one set, the EPA granted full approval to the TSP control measures proposed by the SIP; the approval was based on the state's commitment to implement revisions in the TACB's "Regulation I" to control "fugitive dust emissions." For the other set of nonattainment areas, the EPA granted approval conditioned on the state's adherence to a schedule to make further revisions to Regulation I to provide adequate controls for other "nontraditional sources" of TSP; in the interim, the approved Regulation I was to apply to these areas as well. 45 Fed. Reg. at 19234.

Petitioners claim that, despite the state's revisions to Regulation I and the state's commitment to revise it further, the SIP does not contain "enforceable measures" to ensure attainment of TSP standards. They point out that, although the revisions in Regulation I are designed to control fugitive dust emissions by prohibiting use of certain roads unless the roads are oiled or paved, the plan does not specify who is to do the oiling or paving.

We do not think the EPA's approval and condition approval of the TSP portions of the SIP were arbitrary or capricious. The EPA determined that implementation of the revisions to Regulation I would enable the state to satisfy the TSP standards; petitioners have given us

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reasons. First, this court has no competence to evaluate the import of these documents. We do not know whether the "NO_x emission density" in rural areas results only from sources located in the rural areas or may also result from sources located in urban areas. Second, the EPA has not had an opportunity to respond to this material. We do not deem this an appropriate case to add the material and require the EPA to make a surreply. Petitioners had adequate notice of the reasons behind the EPA's policy. They have no excuse for not including materials on rural NO_x in the original record.

no reason to question the propriety of this conclusion. We think that the agency was entitled to assume that the TACB would enforce its regulations. *See Friends of the Earth v. USEPA*, 499 F.2d 1118, 1124 (2d. Cir. 1974) (EPA could assume state would implement plan despite absence of detail). If the TACB fails to do so, then either the EPA or a concerned citizen may bring an enforcement action. *See* 42 U.S.C. §§ 7413(a)(2), 7604(a); *Friends of the Earth v. Carey*, 552 F.2d 25 (2d Cir.) (citizen suit), *cert. denied*, 434 U.S. 902, 98 S.Ct. 296, 54 L.Ed.2d 188 (1977). The only issue before us now is the sufficiency of the SIP on its face; and since petitioners have given us no ground for finding the TSP provisions insufficient, we cannot hold that the EPA's actions were arbitrary or capricious.[28]

F. *New Source Review*

A Part D SIP must contain a provision requiring that no permit for the construction or operation of certain sources of pollution shall be issued unless

> the permitting agency determines that—
>
> > . . . by the time the source is to commence operation, total *allowable* emissions from [all sources] will be sufficiently less than total emissions from existing sources *allowed* under the applicable implementation plan . . . so as to represent (when considered together with the

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[28] Petitioners also rely on an alleged inconsistency between an EPA internal memorandum of August 23, 1979 and the EPA's final conclusion that the SIP contained enforceable TSP measures. The memorandum in question merely refers to the part of the EPA's August 1 notice proposing conditional approval of part of the TSP portion of the SIP, 44 Fed. Reg. 45204, 45208 (1979); the EPA's final action was based on the state's commitment to fulfill the conditions proposed. *Compare id. with* 45 Fed. Reg. at 19235. We fail to perceive any inconsistency between these documents.

> plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title).

CAA § 173(1)(A), 42 U.S.C. § 7502(1)(A) (emphasis added); *see id.* § 172(b)(6), 42 U.S.C. § 7502(b)(6). The EPA conditionally approved the provisions for this "new source review" in the Texas SIP. 45 Fed. Reg. at 19235-36.

Petitioners' single objection to the conditional approval is that, in formulating the SIP, the EPA has permitted Texas to set "allowable" emissions at a higher level than actual emissions. Therefore, petitioners claim, the TACB will be able to offset increased emissions from new sources with paper reductions in "allowable" emissions from old sources. The result of the new source review could be an increase in actual emissions.[29]

The EPA's answer is that the very terms of the statute permit the use of "allowable" emissions as a baseline. So long as the implementation plan is based on "allowable" emissions and provides that the emissions allowed will conform to the national standards as required by the statute, the EPA argues, the Texas approach is consistent with the statutory language. We cannot say this interpretation is an unreasonable one.[30]

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[29] There is absolutely no basis in the record for us to determine whether Texas is actually carrying out its new source review in this manner or that the result of the review is an increase in actual emissions. For purposes of this decision, however, we will assume that petitioners' allegations are true.

[30] Petitioners rely on the definitions section of Part D for their argument that "allowable" must mean "actual." To identify a "nonattainment area," the state and the EPA may use "monitored data" or "air quality modeling." CAA § 171(2), 42 U.S.C. § 7501(2). Petitioners claim that since "monitored data" identifies actual emissions, and since Texas used this approach to identify its "nonattainment areas," it should not now be allowed to use a "modeling" approach—*i.e.*, setting baseline "allowable" emissions and calculating reductions therefrom—in its implementation plan.

Indeed, it is fully supported by the legislative history of § 178.[21]

G. *Failure to Meet the Requirements of Section 110 of the Act*

Petitioners argue that the Part D revisions should have been disapproved because they did not meet the requirements of § 110 of the Act. We are troubled by the question whether we have jurisdiction of these claims. Petitioners' § 110 claims are directed not at the adequacy of the Part D revisions, but rather at alleged continuing deficiencies in the state's overall implementation plan. Section 307(b)(1) of the Act gives us jurisdiction of petitions for direct review of any "final action" of the Administrator filed within sixty days after notice of such action appears in the *Federal Register*. 42 U.S.C. § 7607(b)(1). Thus, we can review petitioner's claims only if the alleged deficiencies were required to be remedied in the Part D revisions.

First, petitioners claim that the Part D revisions did not meet the requirement of § 110(a)(2)(A)(ii), 42 U.S.C. § 7410(a)(2)(A)(ii), that a SIP "specif[y] a reasonable time at which" the national secondary standards will be met. Since Part D requires that the SIP revisions "shall provide for attainment of" both primary and secondary standards in nonattainment areas "as expeditiously as practicable," CAA § 172(a), 42 U.S.C. § 7502(a), we believe that the state was required to

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We do not see why this must necessarily be so. If the EPA has determined that the emissions allowed under the plan will ultimately conform to the national standards—a determination petitioners have not shown to be unreasonable—then the agency has no duty to demand that the state use a different method, even if another method might be preferable.

[21] *See* H.R. Conf. Rep. 564, 95th Cong., 1st Sess. 157 (1977) ("The baseline for calculating offsets is the implementation plan in effect at the time of an application for a permit for a new or modified source.").

specify in its Part D revisions the time at which the secondary standards would be met. Petitioners are simply incorrect, however, in claiming that the state has not done so. *See* 45 Fed. Reg. 19231, 19245 (1980).

Second, petitioners claim that the Texas Part D revisions do not meet the requirements of § 110(a)(2)(J), 42 U.S.C. § 7410(a)(2)(J), because they do not meet the requirements of Part C of Subchapter I of the Clean Air Act, §§ 160-169A, 42 U.S.C. §§ 7470-7491. Part C, which was also added by the 1977 Amendments, concerns SIP requirements for the prevention of significant deterioration. The schedule for compliance with Part C, however, is different from the schedule for compliance with Part D. Part D requires the Administrator to promulgate regulations providing for the "prevention of significant deterioration" in certain areas. CAA §§ 161, 169A(a)(4), 42 U.S.C. §§ 7471, 7491(a)(4). The state then has nine months to revise the SIP. 1977 Amendments, Pub. L. No. 95-95 § 406(d)(2)(B), 91 Stat. 685 *as amended by* Pub. L. No. 95-190 § 14(b)(6), 91 Stat. 1393 (see note under 42 U.S.C. § 7401). Petitioners have pointed to no Part C regulation which would have required Texas to submit Part C revisions to its SIP. Thus, we cannot infer that the approval and conditioned approval of the Texas Part D revisions was a "final action" on the state's duty to comply with Part C. We have no basis for assuming jurisdiction of this claim.

We reach a similar conclusion with respect to petitioners' claim that the Texas Part D revisions failed to comply with § 110(a)(2)(K), 42 U.S.C. § 7410(a)(2)(K.) This provision, also added by the 1977 Amendments, Pub. L. No. 95-95 § 108(b), 91 Stat. 685, required every state to revise its SIP to

> require[] the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after August 7, 1977, the reasonable costs (incurred after August 7, 1977) of implementing and enforcing the terms and conditions of such permit (not including any court costs or other costs associated with any enforcement action).

42 U.S.C. § 7410(a)(2)(K). Each state was to submit its SIP revision to comply with this provision by August 7, 1978. 1977 Amendments, Pub. L. No. 95-95 § 406(d)(2)(A), 91 Stat. 685 *as amended by* Pub. L. No. 95-190 § 14(b)(6), 91 Stat. 1393 (see note under 42 U.S.C. § 7401).

We do not see how the approval and conditional approval of the Texas Part D revisions is a "final action" on the requirements of § 110(a)(2)(K). For all the record before us shows, Texas may have submitted a SIP revision attempting to comply with this provision on August 7, 1978. The Administrator may have approved it. If this were the case, petitioners' challenge would not be timely. If, as petitioners' cursory treatment of this issue seems to indicate, Texas has never submitted the required SIP revision, then the appropriate remedy would be a district court action to compel the Administrator to perform a nondiscretionary duty, CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2),[22] not a petition

[22] Petitioners did file an action in district court pursuant to § 304(a)(2); as we have noted above, *see* note 1 *supra*, we decide the appeal from the dismissal of that suit today. Petitioners did not allege in their complaint in that action that the Administrator had failed to perform his duty, under § 110(c)(1), to promulgate a provision for the Texas SIP requiring the collection of fees. This

to this court for review of a "final action" of the Administrator under § 307(b)(1), 42 U.S.C. § 7607(b)(1). Because we have no basis for concluding that the SIP provision required by § 110(a)(2)(K) should have been included in the state's Part D revisions, we have no "final action" to review.

H. *Designation of Nonattainment Areas*

Petitioners contend that the EPA should have designated more areas of Texas as nonattainment areas. As we have recounted above,[33] the EPA published initial designations and solicited comments on March 3, 1978, and then published a "final rulemaking" designating the nonattainment areas on September 11, 1978. 43 Fed. Reg. 40412. The EPA argues that petitioners' challenge is not timely because its petitions were not "filed within sixty days from the date notice of . . . promulgation . . . appear[ed] in the Federal Register." CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1).

Petitioners' sole answer to the applicability of the sixty-day time bar is a citation to *United States Steel Corp. v. USEPA*, 595 F.2d 207, *clarified*, 598 F.2d 915 (5th Cir. 1979). In that case, the EPA argued that the nonattainment designations were not final actions, but were merely a step in the Part D revision process, and that judicial review should await final agency action on the state SIP revisions. We assumed for the sake of argument that the EPA was correct, *see id.* at 211, 212 n.10, but we held that the designations at issue were ripe for review because they had immediate, adverse consequences on the petitioning steel companies, *id.* at 211-12

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omission may have been inadvertent, since petitioners did complain of the failure in the notice they gave as a prerequisite to their citizen's suit under § 304(b), 42 U.S.C. § 7604(b). Nevertheless, petitioners did not make an allegation in their complaint or raise the point on appeal.

[33] *See* section II.A. *supra*.

Now that the issue is squarely before us and we have considered it more fully, we cannot accept the theory that the nonattainment designations are merely a step in the Part D revision process. The designations published by the EPA were not required by Part D, but by § 107(d) of Part A, 42 U.S.C. § 7407(d). That section makes it clear that the designations are not made solely for purposes of Part D, but "[f]or the purpose of transportation control planning, Part D . . . (relating to nonattainment), Part C . . . (relating to prevention of significant deterioration of air quality), and for other purposes." CAA § 107(d)(1), 42 U.S.C. § 7407(d)(1). Since the effects of the designations are not limited to the Part D revision process, acceptance of petitioners' argument that the designations themselves were not subject to direct review would lead to the conclusion that the designations are open to challenge any time the EPA takes final action on a Part C submission or a transportation control plan. Moreover, as the previous sections of this opinion have demonstrated, Part D provisions, like any other provisions of an implementation plan, are subject to an on-going revision process. Thus, a rule allowing direct review of designations of nonattainment areas whenever a Part D revision is approved would permit continuing, piecemeal challenges to the designations. Such a result would nullify the sixty-day limit on petitions for direct review imposed in § 307(b)(1), 42 U.S.C. § 7607(b)(1).

We think that the designations were "final actions" subject to immediate, direct review under § 307(b)(1) when they were promulgated.[34] The designations were in all respects "final"; since Texas had submitted the

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[34] Other courts of appeals have assumed, without discussion, that the designations were open to immediate, direct review. *United States Steel Corp. v. USEPA*, 605 F.2d 283 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 379 n.3 (3d Cir. 1979).

list of areas subject to the statute's nonattainment provisions and the EPA had substantially approved it, it was clear that nothing in the Part D revision process would lead to the addition of more nonattainment areas. The state was obviously going to base its Part D revisions on the EPA's "final" designations. It is unfair for petitioners to insist that the state start the Part D revision process all over again when they have failed to raise their arguments until the completion of the process.[88] We therefore hold that their petition for direct review of the September 11, 1978 designations is untimely.

CONCLUSION

We wish to point out several decisions we do not reach today. We do not decide that the state of Texas is complying with the Clean Air Act. We do not decide that the state's implementation plan provides for attainment of the national air quality standards as expeditiously as practicable. We do not even decide that the state's Part D revisions comply with the nonattainment requirements of the 1977 Amendments. We have before us only a document entitled "state implementation plan," and we merely decide, within the limits imposed by our institutional competence, that the petitioners have not demonstrated that the agency acted arbitrarily or capriciously in determining that the document complied with certain statutory requirements.

Petitioners have raised many substantial issues concerning the Clean Air Act and the state's efforts to comply with it. We have attempted to treat them as thoroughly as the submissions of the parties and our independent research into the law would allow. We dislike having to decide such issues on the basis of the inadequate record and the inadequate briefing we have re-

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[88] We note that petitioners do not claim to have relied on the position the EPA took in the *U.S. Steel* litigation or that they were even aware that the EPA had ever taken such a position.

ceived in this case. As for the record, we have complained before about the awkwardness of this review procedure; the best we can do is to refer to Judge Clark's cogent concurring statement in *Texas v. EPA*, 499 F.2d at 321-22.

The petitions are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

Nos. 80-1138 & 80-1520

CITY OF SEABROOK, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petitions for Review of Orders of the
United States Environmental Protection Agency

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

These causes came on to be heard on the petitions of City of Seabrook, Texas, et al, for review of orders of the United States Environmental Protection Agency; and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that these petitions for review of orders of the United States Environmental

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Protection Agency in these causes be, and the same are hereby denied;

IT IS FURTHER ORDERED that the petitioners pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

October 30, 1981

Issued As Mandate: Dec. 14, 1981

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

UNIT A

Nos. 80-1138, 80-1520

CITY OF SEABROOK, TEXAS, ET AL,
Petitioners,

versus

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Petitions for Review of Orders of the
United States Environmental Protection Agency

No. 80-2103

CITY OF SEABROOK,
Plaintiff,

RICHARD D. ROGAN, ET AL.,
Plaintiffs-Appellants,

versus

DOUGLAS M. COSTLE, Administrator, E.P.A.,
Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-, October 4, 1980.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 30, 5 Cir., 1981, —— F.2d ——)
(December 3, 1981)

Before REAVLEY, RANDALL and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Clean Air Act which is codified at 42 U.S.C. 7401, *et seq.*

42 U.S.C. 7410(a)(2)

> The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> > (A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
> >
> > • • •
> >
> > (I) It provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such

construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas); * * *.

42 U.S.C. 7410(c)(1)

The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. * * *.

42 U.S.C. 7502

(a)(1) The provisions of an applicable implementation plan for a State relating to attainment and

maintenance of national ambient air quality standards in any nonattainment area which are required by section 7410(a)(2)(I) of this title as a precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both), if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) of this section shall—

(1) be adopted by the State (or promulgated by the Administrator under section 7410(c) of this title) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 7501(1) of this

title) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a) of this section;

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 7503 of this title (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 7504 of this title (relating to planning procedures) and include [illegible] identification and analysis of the air quality.

health, welfare, economic, energy, and social effects of the plan provisions required by this subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a) of this section—

(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment of the applicable national ambient air quality standard not later than December 31, 1987.

(c) In the case of a State plan revision required under the Clean Air Act Amendments of 1977 to be submitted before July 1, 1982, by reason of a demonstration under subsection (a) (2) of this section, effective on such date such plan shall contain enforceable measures to assure attainment of the applicable standard not later than December 31, 1987.

42 U.S.C. 7506(a)

The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance, in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained,

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).

Opposition

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Office - Supreme Court, U.S.
FILED
JUN 21 1982
ALEXANDER L. STEVAS

No. 81-1630

In the Supreme Court of the United States

OCTOBER TERM, 1981

PAUL VAVRA, RICHARD RODER AND EDWARD SARTAIN,
PETITIONERS
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency had authority under the Clean Air Act, 42 U.S.C. (Supp. III) 7401 *et seq.*, to grant conditional approval of the State of Texas' plan for attaining and maintaining national ambient air quality standards in the state.

2. Whether the Administrator's approval, conditional approval, or disapproval of certain portions of Texas' plan was arbitrary and capricious.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alabama Power Company v. *Costle*, 636 F.2d 323 ... 14
City of Seabrook v. *Costle*, 659 F.2d 1371 6
Connecticut Fund for Environment v. *EPA*, 672 F.2d 998 ..... 7, 8, 9, 13
Lawn v. *United States*, 355 U.S. 339 9
Train v. *NRDC*, 421 U.S. 60 2
Youakim v. *Miller*, 425 U.S. 231 9

Statutes and regulation:

Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 42 U.S.C. (Supp. III) 7401 *et seq.*: 2

Section 109, 42 U.S.C. (Supp. III) 7409 2
Section 110(a)(1), 42 U.S.C. (Supp. III) 7410(a)(1) 2
Section 110(a)(2), 42 U.S.C. (Supp. III) 7410(a)(2) 7
Section 110(a)(2)(A), 42 U.S.C. (Supp. III) 7410(a)(2)(A) 2
Section 110(a)(2)(B), 42 U.S.C. (Supp. III) 7410(a)(2)(B) 2
Section 110(a)(2)(G), 42 U.S.C. (Supp. III) 7410(a)(2)(G) 2
Section 110(a)(2)(I), 42 U.S.C. (Supp. III) 7410(a)(2)(I) 3, 11
Section 110(c), 42 U.S.C. (Supp. III) 7410(c) 2, 4, 6, 10, 12

Statutes and regulation—Continued — Page

Part D, 42 U.S.C. (Supp. III) 7501-7508 2

Section 171(2), 42 U.S.C. (Supp. III) 7501(2) 3
Section 172(a)(2), 42 U.S.C. (Supp. III) 7502(a)(2) 3
Section 172(b)(2), 42 U.S.C. (Supp. III) 7502(b)(2) 4
Section 172(b)(10), 42 U.S.C. (Supp. III) 7502(b)(10) 4, 13
Section 172(b)(11), 42 U.S.C. (Supp. III) 7502(b)(11) 13, 15
Section 172(b)(11)(A), 42 U.S.C. (Supp. III) 7502(b)(11)(A) 4, 6, 14, 15
Section 172(b)(11)(B), 42 U.S.C. (Supp. III) 7502(b)(11)(B) 4, 6, 12, 15
Section 172(c), 42 U.S.C. (Supp. III) 7502(c) 13
Section 129(c), 42 U.S.C. (Supp. III) 7502 note .. 3
Section 173, 42 U.S.C. (Supp. III) 7503 14
Section 176, 42 U.S.C. (Supp. III) 7506 ..... 9, 14
Section 176(a), 42 U.S.C. (Supp. III) 7506(a) 9
Section 301, 42 U.S.C. (Supp. III) 7601 4
Section 301(a)(1), 42 U.S.C. (Supp. III) 7601(a)(1) 8
Section 304, 42 U.S.C. (Supp. III) 7604 6-7
Section 316, 42 U.S.C. (Supp. III) 7616 ..... 9, 14
Section 316(a), 42 U.S.C. (Supp. III) 7616(a) 9

42 U.S.C. 1857c-5(a)(2)(A) 2
40 C.F.R. 81.344 5

Miscellaneous:

43 Fed. Reg. 21673-21676 (1978) 13

44 Fed. Reg. (1979):

p. 20372 13
pp. 38471-38472 ..... 4, 9, 10, 11
p. 38472 ..... 9, 10, 11
p. 38583 ..... 4, 5, 10, 11
p. 45202 5
pp. 45204-45210 5
p. 45205 5
p. 67182 ..... 4, 5

44 Fed. Reg. 74830-74832 (1979) 5, 6, 12

Miscellaneous--Continued Page

45 Fed. Reg. (1980):

pp. 19231-19245 ..... 5, 10
pp. 19232-19233 15
p. 19235 ..... 10, 11
pp. 19277-19278 11

46 Fed. Reg. (1981):

p. 30367 14
p. 47544 ..... 11, 12

H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977) .. 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1828

PAUL VAVRA, RICHARD RODER AND EDWARD SARTAIN, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 659 F.2d 1349.

JURISDICTION

The judgment of the court of appeals (Pet. App. 45a-46a) was entered on October 30, 1981, and a petition for rehearing was denied on December 3, 1981 (Pet. App. 47a-48a). On February 23, 1982, Justice White extended the time for filing a petition for a writ of certiorari until April 2, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the Environmental Protection Agency's approval of the State of Texas' im-

plementation plan for attaining and maintaining national ambient air quality standards pursuant to Part D of the Clean Air Act, 42 U.S.C. (Supp. III) 7501-7508.

Under Section 109 of the Clean Air Act, 42 U.S.C. (Supp. III) 7409, the Administrator of the Environmental Protection Agency is responsible for establishing two sets of nationwide air quality standards. The "primary" standards, designed to protect the public health, were originally scheduled to be attained no later than 1975. 42 U.S.C. 1857c-5(a)(2)(A); see *Train* v. *NRDC*, 421 U.S. 60, 64-67 (1975). The "secondary" standards, designed to protect public welfare, were to be achieved within "a reasonable time." Section 110(a)(2)(A), 42 U.S.C. (Supp. III) 7410(a)(2)(A). Each state was required to submit to the Administrator for approval a state implementation plan (SIP) for "implementation, maintenance, and enforcement" of the air quality standards for every portion of the state. 42 U.S.C. (Supp. III) 7410(a)(1). If the state failed to submit an adequate plan, the Administrator was required to promulgate a plan for the state. 42 U.S.C. (Supp. III) 7410(c).

Each SIP must include emission limitations for stationary pollution sources, schedules for compliance, and provisions for such additional methods of pollution controls as are necessary to ensure attainment of the national standards. In addition, each SIP must include measures designed to reduce pollution from motor vehicles, including programs for automobile inspection and maintenance ("I/M") and other transportation control programs necessary to ensure attainment and maintenance of the national standards. 42 U.S.C. (Supp. III) 7410(a)(2)(B) and (G).

In the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, Congress added to Title I of the Act a new Part D (42 U.S.C. (Supp. III) 7501-7508), which

applied to "nonattainment areas," *i.e.*, areas in which national ambient air quality standards had not been met (42 U.S.C. (Supp. III) 7501(2)). Under Part D, the deadlines for attainment of the primary ambient air quality standards for most pollutants were extended from 1975 until December 31, 1982. 42 U.S.C. (Supp. III) 7502(a)(1). To ensure that those new deadlines would be met, Congress required states to submit substantially revised SIPs for nonattainment areas by January 1, 1979. Clean Air Act Amendments of 1977, Section 129(c), 42 U.S.C. (Supp. III) 7502 note. If those revisions met the Act's requirement, EPA was to approve them by July 1, 1979.

Congress also sought to prevent the exacerbation of existing violations in nonattainment areas during the period when the states were formulating their revised plans. Accordingly, each state was required to include a provision in its existing SIP imposing a limited conditional moratorium on the construction or modification of major stationary sources in such areas. The moratorium, which was to take effect after July 1, 1979, was to affect only sources that would emit 100 tons or more per year of a pollutant with respect to which the national ambient air quality standard was being violated in the particular area. The moratorium was to operate only until EPA approved or promulgated a revised SIP complying with the provisions of Part D. 42 U.S.C. (Supp. III) 7410(a)(2)(I).

A special problem was posed by the widespread failure to meet the 1975 deadline for attaining air quality standards for automobile exhaust pollutants, such as carbon monoxide and photochemical oxidants (ozone). In 1977, Congress authorized EPA to grant extensions until December 31, 1987, for meeting those two standards. 42 U.S.C. (Supp. III) 7502(a)(2). However, to minimize the

adverse health effects of such extensions, any state receiving such an extension was required to include an enforceable I/M program in its revised SIP and to implement that program "as expeditiously as practicable." 42 U.S.C. (Supp. III) 7502(b)(2), 7502(b)(10) and 7502(b)(11)(B). See H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 282 (1977). In addition, Congress required any state receiving an extension to include in its revised SIP a program requiring that an analysis be made of alternative sites, sizes, production processes, and environmental control techniques prior to the state's issuance of a permit to construct or modify any major source of pollutants in a nonattainment area. 42 U.S.C. (Supp. III) 7502(b)(11)(A).

Many states with nonattainment areas did not submit revised SIPs by July 1, 1979, and some of those states also failed to amend their existing SIPs to impose the required construction moratorium. Therefore, on July 2, 1979, acting pursuant to 42 U.S.C. (Supp. III) 7410(c) and 7601, the Administrator issued a regulation that had the effect of imposing the required moratorium in each noncomplying state. 44 Fed. Reg. 38471-38472 (1979). Texas was among the states subject to the construction moratorium.

On July 2, 1979, the Administrator also announced the agency's conditional approval policy for SIPs. 44 Fed. Reg. 38583 (1979); 44 Fed. Reg. 67182 (1979). The Administrator stated that under this policy the agency would approve portions of revised SIPs that were in substantial compliance with the requirements of Part D of the Act but that had minor deficiencies, provided that the state agreed to correct the deficiencies expeditiously. If the state made the corrections, the plan would be approved unconditionally. However, if the state failed to submit the corrections on schedule or if EPA determined that the state's corrections were inadequate, the conditional ap-

proval would be withdrawn, the revised SIP would be disapproved, and the construction moratorium would be reinstated. *Ibid.*

On April 13, 1979, following the Administrator's designation of certain portions of the State of Texas as nonattainment areas for total suspended particulates (TSP), ozone, and carbon monoxide (40 C.F.R. 81.344), Texas submitted a revised SIP outlining the strategies it intended to employ in order to attain the national standards for those pollutants. 44 Fed. Reg. 45202 (1979). Texas also requested an extension until December 31, 1987, for attaining the national standards for ozone because it claimed it was unable to meet the December 31, 1982 deadline. 44 Fed. Reg. 45205 (1979).

On August 1, 1979, EPA published a notice proposing to approve, conditionally approve, and disapprove various portions of Texas' revised SIP. 44 Fed. Reg. 45204-45210. On December 18, 1979, after soliciting and considering public comment on the proposed actions, EPA granted final unconditional approval to the portion of Texas' plan pertaining to the establishment of a motor vehicle inspection and maintenance program for one county and also approved the state's requested extension for meeting the national standards for ozone in that county. 44 Fed. Reg. 74830-74832. On March 25, 1980, the Administrator gave full or conditional approval to the remaining portions of the revised Texas SIP. 45 Fed. Reg. 19231-19245. In granting conditional approval for certain portions of the plan, the Administrator concluded that those portions substantially complied with the requirements of Part D, that the state had agreed to correct the deficiencies in its plan, and that the deficiencies were not of such magnitude as to impair attainment of the national standards by the statutory deadlines. See 45 Fed. Reg. 19231-19245 (1980). As a consequence, the

construction moratorium that had gone into effect in Texas on July 1, 1979, was lifted.

Petitioners then filed a petition for review in the United States Court of Appeals for the Fifth Circuit challenging the Administrator's unconditional approval of the motor vehicle inspection and maintenance portion of the revised Texas SIP. Petitioners subsequently filed another petition seeking review of the Administrator's final or conditional approval of the remaining portions of the plan.[1] Petitioners advanced three major arguments. First, they asserted that the Clean Air Act required the Administrator either to "approve" or "disapprove" the SIP and that granting conditional approval was outside his statutory authority. Second, petitioners argued that even if the Administrator had authority to extend conditional approval, the Texas SIP did not qualify because it contained major, rather than minor, defects. Hence, they maintained that the Administrator should have disapproved those portions of the plan that were conditionally approved and should have promulgated a federal SIP in place of the state's plan. Third, petitioners contended that the Administrator should not have fully approved Texas' motor vehicle inspection and maintenance program and its program for analyzing the impact of construction of new sources in the state because those programs did not comply with the requirements of Section 172(b)(11)(A) and (B) of the Act, 42 U.S.C. (Supp. III) 7502(b)(11)(A) and (B).

The court of appeals unanimously dismissed the petitions for review.[2] The court held that the Administrator

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[1] The petitions were subsequently consolidated and considered jointly by the court.

[2] In a companion case, *City of Seabrook* v. *Costle*, 659 F.2d 1371 (5th Cir. 1981), the court of appeals affirmed the district court's dismissal of an action that petitioners filed against the agency under the citizen suit provision of the Clean Air Act, 42 U.S.C. (Supp. III)

possessed statutory authority to approve SIPs conditionally (Pet. App. 5a-14a) and that the Administrator had properly determined that certain deficiencies in Texas' revised SIP were minor and thus could be conditionally approved (*id.* at 14a-16a). The court upheld the Administrator's approval of the inspection and maintenance program in the Texas SIP, although on a somewhat different ground than that urged by the agency (*id.* at 26a-33a). And the court concluded that Texas' program for analyzing the construction of new sources of pollution adequately complied with the Clean Air Act's requirements (*id.* at 22a-26a). The court subsequently denied rehearing, and no judge requested that the court be polled on rehearing en banc (*id.* at 47a-48a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals and presents no issue that warrants further review by this Court.

1. The court of appeals correctly held that EPA has authority to grant conditional approval of state implementation plans. That power is inherent in the Administrator's power to "approve" or "disapprove" an SIP under Section 110(a)(2) of the Act, 42 U.S.C. (Supp. III) 7410(a)(2). *Connecticut Fund for Environment* v. *EPA*, 672 F.2d 998, 1006-1007 (2d Cir. 1982). Conditional approval gives EPA the flexibility it needs to administer the

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7604. In the district court action, petitioners attempted, among other things, to compel the Administrator to promulgate a federal SIP for the State of Texas pursuant to 42 U.S.C. (Supp. III) 7410(c). The district court dismissed petitioners' suit for lack of jurisdiction, and the court of appeals affirmed. Petitioners do not challenge that holding here.

difficult and complex provisions of the Act and is fully consistent with the Act's purposes.[3]

Petitioners do not contest the court of appeals' decision on this point. Instead, they maintain (Pet. 13-15) that the court erred in holding that conditional approval lifted the construction moratorium that went into effect in Texas on July 1, 1979. They contend (Pet. 14-15) that the decision below conflicts on this point with the Second Circuit's decision in *Connecticut Fund for Environment* v. *EPA*, *supra*, and that lifting the construction moratorium eliminated one of the principal tools provided in the 1977 amendments for inducing states to submit revised SIPs (Pet. 13-14). Petitioners' arguments clearly lack merit.

First, there is no conflict between the decision in this case and the Second Circuit's subsequent decision in *Connecticut Fund for Environment* v. *EPA*, *supra*. In the court of appeals, petitioners never argued that the Administrator lacked authority to lift the construction moratorium by conditionally approving an SIP,[4] and the court consequently had no occasion to consider that question. In *Connecticut Fund for Environment* v. *EPA*, *supra*, the Second Circuit held that the construction moratorium could not be lifted in that manner, but the court specifically noted (672 F.2d at 1009 n.23) that that question had not been decided in the present case. Thus, petitioners'

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[3] The Administrator's general rulemaking authority under Section 301(a)(1) of the Act, 42 U.S.C. (Supp. III) 7601(a)(1), provides an additional basis for the conditional approval of SIPs.

[4] In the court of appeals, petitioners argued that the Administrator's conditional approval of Texas' SIP had the unlawful effect of extending the Clean Air Act's deadlines for submission of a revised SIP.

claimed conflict is nonexistent.[5] Moreover, petitioners are precluded from now raising an argument that they failed to raise in the court below. *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958).

Second, even if the court of appeals had held that the Administrator may lift the construction moratorium by granting a conditional approval, petitioners are incorrect in asserting that the construction moratorium was designed to induce states to submit revised SIPs. Although the moratorium may have had that effect as a practical matter, EPA has never viewed the moratorium as a sanction for a state's failure to submit a revised plan. The agency has consistently stated that the purpose of the construction moratorium is simply to prevent pollution problems from getting worse. Thus, the restriction postpones deleterious construction until after an acceptable state plan is in effect. 44 Fed. Reg. 38472 (1979).[6]

Third, assuming that a conditional approval lifts the construction moratorium, EPA's policy of granting con-

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[5] As petitioners concede (Pet. 15 n.10), both circuits agree that the Administrator may conditionally approve a revised SIP. See Pet. App. 5a-14a; *Connecticut Fund for Environment* v. *EPA*, *supra*, 672 F.2d at 1006-1007.

[6] Congress provided other measures in the Clean Air Act to encourage states to adopt revised SIPs. The principal measures upon which Congress relied were the federal funding restrictions contained in Sections 176 and 316 of the Act, 42 U.S.C. (Supp. III) 7506 and 7616. Section 176(a) requires the withholding of Clean Air Act and federal highway grants if a state fails to submit or make reasonable efforts to submit a revised SIP that complies with the requirements of Part D and if transportation control measures are needed to attain the national standards. 42 U.S.C. (Supp. III) 7506(a). Section 316(a) of the Act, 42 U.S.C (Supp. III) 7616(a), authorizes the Administrator to withhold sewage treatment construction grants if a state fails to submit a revised SIP that quantifies and provides for the increase in emissions of air pollutants that may be anticipated to

ditional approvals where appropriate did not result in a "nationwide waiver" of the moratorium as petitioners claim (Pet. 20). See also Pet. 15-17. Petitioners create the impression that EPA's conditional approval policy effectively prevented the construction moratorium from going into effect at all. In fact, *all* states lacking approved revised SIPs on July 1, 1979, were subject to the moratorium and did not escape its effect until the Administrator either fully approved or conditionally approved their SIPs. See 44 Fed. Reg. 38472 (1979). Indeed, portions of several states are still subject to a construction moratorium because of their failure to adopt adequate SIPs.

The Administrator's conditional approval of an SIP constitutes a determination that the basic requirements of Part D of the Act have been satisfied and that lifting the moratorium will not interfere with a state's ability to attain the national standards in a timely fashion. 44 Fed. Reg. 38583 (1979). Maintaining the moratorium simply because of minor deficiencies in a state's SIP would not further the moratorium's limited purpose.

As noted above, Texas was subject to a construction moratorium from July 1, 1979, to March 25, 1980, the date on which the Administrator conditionally approved the state revised SIP.[7] 45 Fed. Reg. 19231-19245. Since the

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result directly or indirectly from new sewage treatment capacity brought about by the construction of a new plant.

The ultimate tool at the Administrator's disposal for inducing states to submit revised SIPs is the authority to promulgate a federal plan and displace all state control over pollution control. Section 110(c), 42 U.S.C. (Supp. III) 7410(c).

[7] Even if petitioners are correct in their claim that Congress intended the construction moratorium to serve as a tool for inducing states to submit revised SIPs, the lifting of the moratorium after a conditional approval does not eliminate the pressure that the moratorium exerts on states to submit revised SIPs. An important element of conditional approval is that states must correct their plans by

remaining deficiencies in the SIP were all minor, lifting the moratorium was entirely consistent with Congress' intent. There was no "waiver" of the construction moratorium under those circumstances any more than there is when a state adopts an SIP providing for the timely attainment of the national standards.[8]

2. Petitioners maintain (Pet. 20-24) that conditional approval of Texas' revised SIP was improper because there were major deficiencies in portions of the plan pertaining to control of total suspended particulates in eight counties.

Petitioners' argument on this issue is now moot. EPA conditionally approved this aspect of Texas' revised SIP on March 25, 1980, with the understanding that the state would submit revised control strategies by August 1, 1980. 45 Fed. Reg. 19235. Texas complied with this condition in late July 1980, and on September 29, 1981, the

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the deadlines specified by EPA or else the moratorium will be reinstated. 44 Fed. Reg. 38583 (1979). The possible reinstatement of the moratorium thus provides a continuing incentive for states to make the required corrections in their SIPs. Conditional approval had precisely this effect on Texas. The Administrator gave Texas until August 1, 1980, to fulfill most of the conditions the agency had set in connection with the conditional approval. 45 Fed. Reg. 19235. See also 45 Fed. Reg. 19277-19278 (1980). Texas submitted its corrections by late July 1980. 46 Fed. Reg. 47544 (1981).

[8] Petitioners' suggestion (Pet. 17-20) that conditional approval is inconsistent with the nondiscretionary nature of the construction moratorium is incorrect. The moratorium is only called into play when the Administrator determines that an SIP has failed to comply with the requirements of Part D. See Section 110(a)(2)(I), 42 U.S.C. (Supp. III) 7410(a)(2)(I); 44 Fed. Reg. 38472 (1979). Since, as noted above, conditional approval is in essence a determination that the basic requirements of Part D have been satisfied, there is no basis for maintaining a construction moratorium after a plan has been conditionally approved.

Administrator unconditionally approved this aspect of the plan. 46 Fed. Reg. 47544. Therefore, there is no longer a live controversy concerning the conditional approval of this aspect of Texas' SIP.[9] In any event, whether particular deficiencies in Texas' plan are properly characterized as major or minor is not an issue of general importance that warrants this Court's review.

3. Petitioners next contend (Pet. 25-28) that the court below erroneously concluded that Texas complied with Part D of the Act by submitting a schedule for implementation of a motor vehicle inspection and maintenance program rather than by establishing that it had the legal authority to implement such a program. During the rulemaking proceeding, EPA concluded that Texas had in fact established its legal authority to implement a motor vehicle inspection and maintenance program and that this aspect of its SIP complied fully with the requirements of Section 172(b)(11)(B) of the Act, 42 U.S.C. (Supp. III) 7502(b)(11)(B). 44 Fed. Reg. 74830-74832 (1979). The court of appeals disagreed with EPA's conclusion (Pet. App. 26a-33a) but held that Section 172(b)(11)(B) was satisfied because Texas included a schedule for implementing an inspection and maintenance program as part of its 1979 SIP revisions. The court held that the legal authority to implement the program did not have to be estabished until July 1, 1982, as part of the state's strategy for attaining the standards for ozone and carbon monoxide by the end of 1987 (*ibid.*).

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[9] Petitioners argue (Pet. 20 n.16, 24) that Section 110(c) of the Clean Air Act, 42 U.S.C. (Supp. III) 7410(c) imposes a duty on the Administrator to promulgate a federal SIP if a state fails to adopt its own plan. Petitioners' contention is correct, but since the Administrator has already fully approved those portions of the Texas SIP about which petitioners complain, there is no reason to promulgate a federal SIP for the state.

Although we do not concur with the court of appeals' holding on this point,[10] the question does not warrant further review by this Court because the holding below will not materially affect administration of the Act. First, the court's ruling permits EPA to require adoption of legal authority for such a program prior to July 1, 1982, if the Administrator expressly finds that legal authority for such a program is a reasonably available measure prior to that time. Hence, the agency retains the freedom to require states to submit legal authority for a motor vehicle inspection and maintenance program before July 1, 1982. In addition, the court did not relieve Texas of its responsibility to establish legal authority for an inspection and maintenance program. Rather, the effect of the court's holding was simply to allow Texas until July 1, 1982, to adopt measures providing such authority. At worst, Texas obtained somewhat more time than the rest of the states to adopt such a program. However, the limited impact of the court's decision on this point does not justify further review.[11]

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[10] EPA's disagreement with the court of appeals' holding centers on the relationship between Section 172(c) of the Act, 42 U.S.C. (Supp. III) 7502(c) (which permits states receiving an extension to defer until July 1, 1982, the submission of enforceable measures for attaining the national standards by December 31, 1987) and Section 172(b)(10) and (11) (which set forth the measures that must be included in a state's 1979 SIP submission to EPA). The Administrator construed these provisions to require a state to submit legal authority for a motor vehicle inspection and maintenance program as part of its 1979 SIP revision, since such a program was a reasonably available measure, and to permit the state to defer until its 1982 SIP revision other measures that were not available in 1979 but were necessary to ensure attainment of the national standards by December 31, 1987. 43 Fed. Reg. 21673-21676 (1978); 44 Fed. Reg. 20372 (1979).

[11] In any event, this issue will become moot within the next month when the deadline for Texas' adoption of a motor vehicle inspection and maintenance program expires. If Texas submits a program by

4. Finally, petitioners challenge (Pet. 28-30) EPA's unconditional approval of Texas' program for analyzing alternative sites, sizes, production processes, and environmental controls when considering an application for a permit to construct a new source of pollution in a nonattainment area. Such a program is required by Section 172(b)(11)(A), 42 U.S.C. (Supp. III) 7502(b)(11)(A), for any state that has received an extension of the deadline for attaining the national standards for carbon monoxide and ozone. Petitioners contend that Texas' program failed to comply with the Act because, by allowing the permit applicant to certify that it had conducted an analysis of alternative sites, sizes, production processes, and environmental controls, state officials would have no means of determining that the applicant had peformed an honest and accurate analysis. [12] The short answer to peti-

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July 1, 1982, the extension resulting from the court of appeals' decision will have no further effect. If Texas does not submit its program on time, the construction moratorium will be revived. Moreover, the state will run the risk of losing federal highway and sewage treatment grants. Sections 176 and 316, 42 U.S.C. (Supp. III) 7506 and 7616.

Petitioners overstate (Pet. 25, 27-28) the potential impact of the lower court's holding on states that are required to submit by July 1, 1982, revised SIPs for attaining the December 31, 1987, deadline. Virtually all states needing I/M programs submitted their programs to EPA as part of the 1979 SIP submissions, and all of those submissions occurred well before the courts of appeals' decision in this case. Thus, the court's decision did not undermine those programs in any respect.

[12] Petitioners also complain (Pet. 20) that Texas' program does not allow interested persons to review and comment on the adequacy of the permit applicant's analysis, but nothing in the Clean Air Act requires a state to adopt a provision authorizing such a procedure. Therefore, a state is free to exclude such a provision if it chooses. See Sections 172(b)(11)(A) and 173, 42 U.S.C. (Supp. III) 7502(b(11)(A) and 7503).

tioners' argument is that Section 172(b)(11)(B) does not specify the precise form or content of a state's permit program, and EPA has not promulgated regulations setting forth minimum requirements for such a program. Accordingly, a state is free to develop the program that best fits its own needs. The Administrator may approve the state's program so long as the state gives assurances that it will administer the program in accordance with the requirements of Section 172(b)(11)(A). Texas gave such assurances to the Administrator. 45 Fed. Reg. 19232-19233 (1980). Petitioners make no claim that Texas' assurances were inadequate or improper in any sense. Therefore, their objections to the Administrator's approval of the program should be rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Opposition

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PAUL VAVRA, RICHARD RODER, AND EDWARD SARTAIN,

Petitioners,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the construction moratorium imposed pursuant to 42 U.S.C. 7410(a)(2)(I) which banned, after June 30, 1979, further construction or modification of major stationary sources in nonattainment areas remained in effect after EPA conditionally approved the Texas Part D plan revisions.

2. Whether EPA exceeded its authority in conditionally approving certain portions of the Texas Part D plan revisions.

3. Whether the Court of Appeals erred in holding that the provisions of the Clean Air Act amendments of 1977 pertaining to a motor vehicle emission control inspection and maintenance program were satisfied by the Texas Part D plan revisions which provided a schedule for implementation of an inspection and maintenance program.

4. Whether the Court of Appeals erred when it held that EPA had not acted arbitrarily, capriciously, nor abused its discretion when it approved the Texas Part D plans revisions pertaining to an analysis of alternatives in the pre-construction review of major emitting facilities as required by 42 U.S.C. 7502(b)(11)(A).

TABLE OF CONTENTS

PAGE

REASONS FOR DENYING THE WRIT 1

1. THE CONSTRUCTION MORATORIUM REQUIRED BY 42 U.S.C. 7410(a)(2)(I) WAS NOT AN ISSUE IN THE OPINON BELOW, AND NO CONFLICT EXISTS BETWEEN THE COURTS OF APPEALS 1

2. PETITIONERS LACK STANDING TO CHALLENGE THE APPLICATION OF EPA'S CONDITIONAL APPROVAL POLICY TO THE TEXAS PART D PLAN REVISIONS IN AREAS WHERE THEY HAVE FAILED TO SHOW AN ADVERSE EFFECT. EPA'S APPLICATION OF ITS CONDITIONAL APPROVAL POLICY TO THE TEXAS PART D PLAN REVISIONS FOR SEVEN PARTICULATE NONATTAINMENT AREAS IS MOOT AND FAILS TO RAISE AN ISSUE OF NATIONAL IMPORTANCE 3

3. THE DECISION BELOW SUSTAINING EPA'S UNCONDITIONAL APPROVAL OF THE PORTIONS OF THE TEXAS PART D REVISIONS PERTAINING TO MOTOR VEHICLE EMISSION INSPECTION AND MAINTENANCE PROGRAMS AND TO THE PRECONSTRUCTION ANALYSIS OF MAJOR EMITTING FACILITIES FAILS TO PRESENT ISSUES OF NATIONAL IMPORTANCE REGARDING THE IMPLEMENTATION OF THE FEDERAL CLEAN AIR ACT IN AREAS WHICH MUST ATTAIN THE NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE BY DECEMBER 31, 1987. 6

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: **PAGE**

Connectucut Fund for the Environment v. Environmental Protection Agency, 672 F2d 998 (C.A.2d, 1982) 1,2,3

Good Shot v. United States, 179 U.S. 87 (1900) 2

King Iron Bridge and Manufacturing Company v. Otoe County, Nebraska, 120 U.S. 225 (1887) 3

N.R.D.C. v. Environmental Protection Agency, 481 F2d 116 (C.A. 10th, 1973) 4

Parker v. Ormsby, Nebraska, 141 U.S. 81 (1891) 4

Sierra Club v. Morton, 405 U.S. 77 (1972) 4

STATUTES:

Clean Air Act

42U.S.C. 7410(a)(2) 7

42 U.S.C. 7410(a)(2)(I) 2

42 U.S.C. 7410 (c) 9

42 U.S.C. 7413 10

42 U.S.C. 7502(a)(2) 7

42 U.S.C. 7502(b)(11)(A) 7,10

42 U.S.C. 7502(b)(11)(B) 7,9

§129c of 1977 Amendments (P.L. 95-95) 7

Texas Clean Air Act

Tex.Rev.Civ.Stat.Ann., Art. 4477-5 (Vernon's Supp. 1981), Section 3,30 8

ADMINISTRATIVE REGULATIONS AND NOTICES

44 Fed.Reg. 45204 (August 1, 1979) 5

44 Fed.Reg. 74830 (December 18, 1979) 7

45 Fed.Reg. 19231 (March 25, 1980) 3,4,5

NO. 81-1828

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

PAUL VAVRA, RICHARD RODER, AND EDWARD SARTAIN,

Petitioners,

V.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR STATE OF TEXAS IN OPPOSITION

REASONS FOR DENYING THE WRIT

1. THE CONSTRUCTION MORATORIUM REQUIRED BY 42 U.S.C. 7410(a)(2)(I) WAS NOT AN ISSUE IN THE OPINION BELOW, AND NO CONFLICT EXISTS BETWEEN THE COURTS OF APPEALS.

Petitioners assert that the decision of the court below conflicts with the decision of the Court of Appeals for the Second Circuit in *Connecticut Fund for the Environment v. Environmental Protection Agency,* 672 F2d 998 (C.A. 2d, 1982). In the latter case, the court upheld EPA's conditional approval of State Implementation Plan (SIP) revisions submitted by the State of Connec-

ticut to satisfy the Part D requirements of the 1977 Clean Air Act Amendments, but went on to conclude that the construction moratorium required by 42 U.S.C. 7410(a)(2)(I) applied to the area covered by the plan until the conditions were removed.

Contrary to petitioners' assertion, the Second Circuit specifically rejected the contention that its conclusion in *Connecticut Fund* conflicted with the decision below. In that regard, the court stated:

> "In *City of Seabrook* (referring to *City of Seabrook v. United States Environmental Protection Agnecy,* the style of this case below) petitioners presented the limited claim that conditional approval of Texas' Part D submission violated the deadlines of the statute... *The moratorium on construction was not analyzed.*" *Connecticut Fund supra,* at 1009. (emphasis added)

The court below characterized the issue presented as follows:

> "Petitioners argue that the statutory command that EPA 'shall...approve or disapprove,' Section 110(a)(2), 42 U.S.C. 7410(a)(2). leaves no room for the device of 'conditional approval.' A 'conditional approval,' they argue, is in effect a determination that the SIP is 'not...in accordance with the requirements of the statute, a determination that requires the EPA to promulgate an implementation plan for the state.' CAA Section 110(c)(1)(B), 42 U.S.C. 7410(c)(1)(B)." Pet.App. A 6a[1]

1. "Pet. App." refers to the appendix to the petition in NO. 81-1828.

Only in this Court have Petitioners raised the question of whether the Act's construction moratorium applies where implementation plans are conditionally approved, and it is therefore simply incorrect to assert that the decision below conflicts with *Connecticut Fund*. Accordingly, it would be inappropriate for this court to issue a writ of certiorari to the court below to review such a question.

2. PETITIONERS LACK STANDING TO CHALLENGE THE APPLICATION OF EPA'S CONDITIONAL APPROVAL POLICY TO THE TEXAS PART D PLAN REVISIONS IN AREAS WHERE THEY HAVE FAILED TO SHOW AN ADVERSE EFFECT. EPA'S APPLICATION OF ITS CONDITIONAL APPROVAL POLICY TO THE TEXAS PART D PLAN REVISIONS FOR SEVEN PARTICULATE NONATTAINMENT AREAS IS MOOT AND FAILS TO RAISE AN ISSUE OF NATIONAL IMPORTANCE.

Petitioners assert that, even if conditional approval is an appropriate administrative device, it was improperly applied to Texas' Part D plan revisions by EPA and the court below. This complaint is addressed specifically to the conditional approval for eight separate particulate nonattainment areas across the State.

Before addressing the merits of this contention, it should be noted that Petitioners have no standing to raise this issue and that this Court, therefore, has no jurisdiction to review it. There is no indication whatever that any of the petitioners reside in any of the areas which are nonattainment for particulate, and thus to which the Part D revisions at issue apply. To the contrary, the record clearly reflects that petitioners reside in Harris County, Pet. App. A 1a, while the *nearest* of the nonattainment areas in question is in Corpus Christi *over two hundred miles away*. 45 Fed.Reg. 19231 at

19245 (March 25, 1980). Nor surprisingly, then, there are no allegations of any adverse effect on Petitioners from EPA's action regarding these particulate nonattainment areas.

In order to have standing, a party must clearly demonstrate by facts alleged that "he is himself adversely affected" or those he represents have been "injured in fact" by the agency's conduct. *Sierra Club v. Morton* 405 U.S. 77 (1972). Thus, it has been specifically held that a party challenging action by EPA approving state implementation plans must establish standing by showing injury in fact, bringing the party within the "zone of interests" protected by the Clean Air Act. *Natural Resources Defense Counsel v. Environmental Protection Agency,* 481 F.2d 116 (C.A. 10th, 1973), citing *Sierra Club v. Morton, supra.* It seems highly speculative that Petitioners could make any showing of impact from EPA's action regarding localized nonattainment areas such as those here at issue. In any event, no one has yet been favored with such a showing. Thus petitioners have acquired no standing to present this issue. Accordingly, because standing is jurisdictional, *Natural Resources Defense Counsel v. Environmental Protection Agency, supra,* it was error for the court below to decide this issue even though Petitioners standing was not challenged. *Parker v. Ormsby, Neb.,* 141 U.S. 81 (1891). Since the court below lacked jurisdiction, the petition for writ of certiorari cannot properly be granted under 28 U.S.C. §1254(1) as Petitioners request. *Good Shot v. U.S.,* 179 U.S. 87 (1900); *King Iron Bridge and Manufacturing Co. v. Otoe County, Neb.,* 120 U.S. 225 (1887).

Regarding the merits of Petitioners' assertion it should first be noted that the Part D plan revisions were submitted and unconditionally approved for six particulate nonattainment areas in the State. 45 Fed.Reg.

19231 at 19235, 19244 (March 25, 1980). Revisions were not submitted for the eight areas at issue because it was uncertain whether or not those areas were in fact nonattainment, and thus required revisions. 44 Fed.Reg. 45204 at 45208 (Aug. 1, 1979). Indeed, redesignation of one of the areas in El Paso was pending when final conditional approval was published by EPA. Thus, only seven areas, not eight as petitioners state, were conditionally approved. 45 Fed.Reg. 19231 at 19245 (March 25, 1980).

For these remaining areas a much broader basis than that suggested by Petitioners supports EPA's action. Extensive analysis of particulate nonattainment across Texas had been conducted by the Texas Air Control Board (TACB) in 1977. These analyses, which were provided to EPA and referenced in the initial 1979 Part D plan submittal (R.[2] V.2.), demonstrated that the principal cause of particulate nonattainment throughout Texas was fugitive dust from nontraditional sources, and that existing regulations satisfy the control requirements for traditional sources. Accordingly, Texas responded to the proposed conditional approval by submitting revisions to the control strategy contained in the original Part D submittal. These revisions provided that the fugitive controls in TACB regulation I would be implemented in the disputed nonattainment areas.

Thus, contrary to Petitioners' assertion that EPA's action was baseless, the agency had before it, in general terms, the same strategy for these seven nonattainment areas as had been unconditionally approved for the others. Moreover, it had the background information on which the strategy was based. In reality, then, the additional material to be submitted consisted of nothing more than a detailed recapitulation and formal inclusion

2. R. refers to the record in this case below.

in the SIP of existing information already in EPA's possession, and the application of the controls unconditionally approved elsewhere to the areas in question. This recapitulation and submittal simply provided a formal confirmation of the December 13, 1979, submittal and the tentative conclusion of both agencies that the same fugitive dust controls already unconditionally approved for other areas, and imposed temporarily by EPA in the areas here in issue, were fully adequate to demonstrate attainment. Petitioners acknowledge that this confirmation was submitted and approved. (See Note 17 at Page 22 of Petitioners' Brief).

EPA's action granting unconditional approval to the Part D revision for all nonattainment areas renders the issue of the application of the conditional approval policy to the Texas Part D plan revisions moot. On this record, no issue of mentionable significance, let alone national importance, is presented.

3. THE DECISION BELOW SUSTAINING EPA'S UNCONDITIONAL APPROVAL OF THE PORTIONS OF THE TEXAS PART D REVISIONS PERTAINING TO MOTOR VEHICLE EMISSION CONTROL INSPECTION AND MAINTENANCE PROGRAMS AND TO THE PRECONSTRUCTION ANALYSIS OF MAJOR EMITTING FACILITIES FAILS TO PRESENT ISSUES OF NATIONAL IMPORTANCE REGARDING THE IMPLEMENTATION OF THE FEDERAL CLEAN AIR ACT IN AREAS WHICH MUST ATTAIN THE NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE BY DECEMBER 31, 1987.

The 1977 amendments to the Federal Clean Air Act authorized EPA to grant extensions to the December 31, 1982 attainment date for the photochemical oxident (now ozone) or carbon monoxide national ambient air quality standard if a state demonstrated that such stan-

dard was not attainable by that date despite the implementation of all reasonably available control measures. 42 U.S.C. 7502(a)(2). Texas made the necessary demonstration for ozone in Harris County. Accordingly, EPA extended the attainment date for the ozone standard in Harris County to December 31, 1987. 44 Fed,Reg. 74830 at 74832 (December 18, 1979).

For those areas which received an extension of the attainment deadline beyond 1982, the 1977 amendments require that the states submit additional SIP revision by July 1, 1982 which contain enforceable measures to insure attainment of the applicable standard by December 31, 1987. 129(c) of the 1977 Amendments, Note following 42 U.S.C. 7502. The 1977 amendments also required that the 1979 SIP submittal satisfy the following additional requirements in the "extension areas":

> a. Establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification; (42 U.S.C. 7502(b)(11)(A);
>
> b. Establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program. (42 U.S.C. 7502(b)(11)(B);

The Court below held that EPA properly granted unconditional approval to the Texas SIP provisions responding to the foregoing requirements.

A. THE INSPECTION AND MAINTENANCE REQUIREMENTS

Texas' 1979 SIP submittal included Section 3.30 of the Texas Clean Air Act, TEX.REV.CIV.STAT.ANN. art. 4477-5 (Vernon's Supp. 1981) which responded to the requirement contained in the 1977 amendments concerning a vehicle emission control inspection and maintenance program.[3]

After an extensive and probing analysis of the provisions in the 1977 amendments pertaining to an inspection and maintenace program and their underlying legislative history the court below concluded that:

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3. §3.30 required the Texas Air Control Board with the assistance and cooperation of the Texas Department of Public Safety and the Texas State Department of Highways and Public Transportation to:

> 1. "develop and conduct...a pilot program...for the purpose of inspecting, testing, and compiling a list of a representative sample of motor vehicles giving primary attention to vehicles operated in Harris and contiguous counties..."
>
> 2. "Conduct a comprehensive examination and evaluation of motor vehicle inspection, maintenance and registration programs..."
>
> 3. Submit (on or before December 31, 1980) to the 67th Session of the Legislature a report based on the results of the pilot program and studies required by subsections (b) and (c)..."
>
> 4. Develop and make preparations for a motor vehicle inspection and maintenance program for Harris County by designing, planning, and scheduling the implementation of the necessary elements for such program....the schedule for such program: shall be adequate to allow and achieve the full implementation of the inspection and maintenance program as it affects passenger automobiles of Harris County not later than December 31, 1982..."

> "Congress did not intend to require an 'enforceable' inspection and maintenance program until the 1982 submission unless, prior to that time, the EPA had determined that the implementation of such program was a 'reasonably available' measure." Pet. App. A, 31a

Based upon its analysis the court of appeals held that EPA's approval of the Texas SIP provision concerning an inspection and maintenance program "may have been required by the statute" *Id.* 33a.

Assuming *arguendo* that the court below erred in sustaining EPA's approval of the Texas Part D revisions pertaining to the requirement for a inspection and maintenance program, no issue of national importance warranting review by this Court is presented. First, the court below made clear that an enforceable inspection and maintenance program is a necessary part of the SIP revision due on July 1, 1982 for the "extension areas." Thus, EPA should soon be in a position to approve an enforceable inspection and maintenance program submitted by Texas, or to promulgate its own plan pursuant to the authority of 42 U.S.C. 7410(c). In either case Petitioners' contention that the court erred in sustaining EPA's approval of Texas' Part D revision which failed to contain an "enforceable" inspection and maintenance program will be mooted.

Secondly, the opinion below clearly provided that EPA retains the authority to require the implementation of an "enforceable" inspection and maintenance program prior to July 1, 1982, if it determined that implementation of such a program was a "reasonable available" measure. *Id.* 31a. This reservation of power in EPA is consistent with the court's analysis that Congress used the word "schedule" in Section 152(b)(11)(B), 42 U.S.C. 7502(b)(11)(B) to express its intent that the

states be given sufficient lead time prior to implementation of the program. Presumably, EPA would take into consideration the lead time needed by the states before it determined that an enforceable inspection and maintenance program was a "reasonable available" measure. However, the fact that the court below reserved the power in EPA to require an enforceable inspection and maintenance program prior to the July 1, 1982 plan revision deadline can hardly be construed as raising an issue of national importance which undermines the implementation of inspection and maintenance programs in states which have received an extension of the 1982 attainment deadline as asserted by petitioner.

Lastly, petitioners' attempt to create an isse of national importance by asserting that the decision below would undermine the implementation of an inspection and maintenance program in other states fails to recognize that the Part D SIP revisions previously promulgated by EPA for each state are federally enforceable laws under 42 U.S.C. 7413, and that such state implementation plans remain in effect until EPA approves a revision. Furthermore, the decision below creates no incentive to withdraw from implementation of previously existing inspection and maintenance programs because it requires an enforceable inspection and maintenance program to be included in the Part D SIP revisions due July, 1, 1982, and because it allows EPA to require that an inspection and maintenance program be implemented at an earlier date if it is determined to be a reasonably available measure.

B. ALTERNATIVES ANALYSIS FOR MAJOR EMITTING FACILITIES

Petitioners assert that the Texas Part D Plan provisions relating to the requirements of Section 172(b)(11)(A) of the Clean Air Act, 42 U.S.C. 7502(b)(11)(A), are inadequate, and EPA's approval of

them should not have been affirmed by the court below.

Contrary to Petitioners' characterization of the opinion below (Petitioner's brief at page 28) the court of appeals premised its decision upholding EPA's action on Texas' prexisting SIP requirements for new source review in conjunction with the 1979 revisions assuring that permit applicants who do not perform the required analysis will not be in compliance with the Clean Air Act. Thus, the disposition of this issue by the court below can have no importance whatever for the "thirty other states" referenced by Petitioners absent the highly unlikely coincidence that those states' preexisting SIP requirements for new source review were the same as Texas'. Clearly, the decision presents no issue of national importance which warrants review by this court.

CONCLUSION

The Petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL VAVRA, RICHARD RODER AND EDWARD SARTAIN,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF FOR PETITIONERS IN REPLY TO THE BRIEFS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

CASES:	Page
Brownlow v. Schwartz, 261 U.S. 216 (1923)	6
California v. San Pablo & Tulare R.R. Co., 149 U.S. 308 (1893)	6
Natural Resources Defense Council v. Environmental Protection Agency, 507 F.2d 905 (1974)	8
North Carolina v. Rice, 404 U.S. 244 (1971)	6
Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)	7
The Connecticut Fund for the Environment, Inc. v. Environmental Protection Agency, 672 F.2d 998 (C.A. 2, 1982)	1, 3, 5
STATUTES AND REGULATIONS:	
Clear Air Act	
42 U.S.C. 7410(a)(2)(I)	2, 4
42 U.S.C. 7410(c)	7
42 U.S.C. 7502(b)(11)(A)	9, 10
42 U.S.C. 7502(b)(11)(B)	8, 9
42 U.S.C. 7502(c)	3
Section 129(c) of the 1977 Amendments (Pub. L. 95-95)	3
POLICY STATEMENTS AND NOTICES:	
44 Fed. Reg. 38583 (July 2, 1979)	2

BRIEF FOR PETITIONERS IN REPLY TO THE BRIEFS IN OPPOSITION TO THE PETITION FOR CERTIORARI

Petitioners reply below to the contentions of respondent Environmental Protection Agency and of the State of Texas * in opposition to the petition for certiorari.

1. Petitioners have argued (Pet. 12-20) that the decision of the court below sustaining EPA's authority to lift the construction moratorium when giving conditional approval to a state's Part D SIP revisions is in conflict with the decision of the Court of Appeals for the Second Circuit in *The Connecticut Fund for the Environment, Inc. v. Environmental Protection Agency*, 672 F.2d 998 (1982), presents an issue of national significance and is inconsistent with the language and legislative history, as well as EPA's own interpretation, of the 1977 Amendments to the Clean Air Act (Pub. L. No. 95-95, 91 Stat. 685). Respondent and the State of Texas have presented three reasons why the issue of EPA's authority to lift the construction moratorium when giving conditional approval to a state's SIP revisions does not warrant review by the Court.

First, respondent contends (EPA Br. 8) that petitioners did not argue in the court below that the EPA lacked the authority to lift the construction moratorium when conditionally approving Part D revisions. It therefore argues (*id.* at 8-9) that no conflict on this issue exists between the court's decision and the decision of the Second Circuit in *The Connecticut Fund for the Environment* and that petitioners are precluded from presenting this issue to the Court. See also Texas Br. 1-3.

In fact, petitioners presented this issue to the court of appeals as part of our argument against EPA's conditional approval policy.[1] Initially, we noted that an es-

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* Texas participated as a respondent-intervenor in the court of appeals.

[1] Opening Brief for Petitioners in court of appeals, pp. 4-12, 28.

sential component of EPA's conditional approval policy is the waiver or lifting of the construction moratorium. We then argued that EPA is required by the Clean Air Act, 42 U.S.C. 7410(a)(2)(I), to apply the moratorium after July 1, 1979, in the nonattainment areas of all states, except where it has determined that a state's SIP revisions meet all the requirements of Part D of the Act. Since the conditional approval of a state's revisions rests upon a determination that the revisions do not meet all the Part D requirements (see 44 Fed. Reg. 38583 (July 2, 1979)), we contended that EPA lacks the authority to accompany a conditional approval with the lifting of the construction moratorium. Finally, we argued that since the lifting of the moratorium is precisely what the conditional approval policy accomplishes, the policy itself is invalid. Thus, in upholding the conditional approval policy, the court below necessarily rejected our argument that EPA lacks the authority to lift the construction moratorium when conditionally approving Part D revisions and concluded that it possessed such authority.

Respondent is apparently arguing that petitioners are barred from raising this issue because of the manner in which we presented it to the court below. Respondent would have preferred that petitioners had acknowledged the validity of the conditional approval policy and then have argued that, despite the policy's overall validity, its application could not be accompanied by a waiver of the construction moratorium. Instead, petitioners elected to argue that EPA lacked the authority to waive the moratorium on the basis of the conditional approval of a state's plan and that this aspect of the policy rendered the policy itself invalid. That the issue was not presented in the particular manner identified by respondent obviously cannot obscure the fact that it was presented to the court below.

The fact that the court of appeals did not directly analyze in its opinion this aspect of petitioners' challenge to the conditional approval policy does not preclude the

issue from being presented to this Court. While any issue presented in a petition for certiorari must have been raised in the court below, it is not necessary for the issue to have been expressly discussed in the lower court's decision. Here, it is more than sufficient that the holding of the court below conflicts with the decision of the Second Circuit in *The Connecticut Fund for the Environment*. Under the decision of the court below, major sources of pollution may be constructed in nonattainment areas subject to a conditionally-approved state plan; under the Second Circuit decision, such construction is barred until a final unconditional approval of the plan is issued.

Second, respondent argues (EPA Br. 9-10) that this issue is not of national significance. However, rather than establishing the absence of any national importance, it merely says that the issue does not affect *all* the states and that a construction moratorium has been imposed in some states. Although factually correct, these statements do not diminish the fact that, in late 1981, 31 states were still operating under conditionally-approved implementation plans and consequently were not subject to the construction moratorium.[2] Nor do respondent's statements diminish the fact that 31 other states[3] are required to submit additional Part D SIP revisions this summer because one or more of their nonattainment areas have been given an extension in the attainment deadline to December 31, 1987. See Section 129 of the 1977 Amendments, note under 42 U.S.C. 7502, and 42 U.S.C. 7502(c). Based on the experience with the 1979 plan revisions,[4] it is almost certain that EPA will condi-

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[2] Since respondent has not stated otherwise, we presume that most, if not all, these states continue to operate under conditionally-approved SIPs.

[3] These are not all the same states as those which now have conditionally-approved plans.

[4] Of the 31 states submitting SIP revisions in 1979, 43, or over 80%, received conditional approvals of at least part of their Part D plans. See Pet. 15, 17 note 13. Respondent has given no reason

tionally approve the 1982 plan revisions of most of these states, thereby waiving the construction moratorium despite finding that the revisions do not meet all the requirements in Part D of the Act. Thus, the issue of EPA's authority to waive the construction moratorium when conditionally approving a state's SIP revisions raises a question of continuing national importance.

Third, on the merits of the issue, respondent argues (EPA Br. 9-10) that EPA is authorized to waive the construction moratorium when conditionally approving state plans. However, its argument is based entirely upon what it characterizes as the moratorium's "limited purpose." *Id.* at 10. This limited purpose, according to respondent (*id.* at 9), is "simply to prevent pollution problems from getting worse" during the time it takes the states to revise their plans to meet the requirements of Part D. Application of the moratorium following conditional approval of a state's revisions, it contends (*id.* at 9, 10), would not further this purpose since air pollution will not "get[] worse" during the time a state needs following conditional approval to bring its plan into full compliance with Part D.

Respondent's position is incorrect because it rests upon the erroneous view that the purpose of the construction moratorium is limited to preventing the exacerbation of air pollution. This view of the moratorium's purpose is directly inconsistent with the language of 42 U.S.C. 7410(a)(2)(1). That section prohibits the construction of any major stationary source "whose emissions will cause or contribute to concentrations of any air pollutant for which a national air quality standard is exceeded" in the area in which the source proposes to locate. Thus, Congress rested the construction ban on the nonattainment status of the area in which a major source seeks to locate rather than the effect that emissions from the

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to believe that a comparable portion of the 31 states required to submit additional revisions this summer will not receive conditional approvals.

source would have on the area's air quality. This shows that Congress adopted the construction moratorium as an enforcement mechanism not merely to prevent pollution problems from worsening but to induce the states to adopt plans as quickly as possible which would make progress toward meeting the national standards. See Pet. 12-13, 18-20.

In *The Connecticut Fund for the Environment*, the Second Circuit expressly rejected EPA's argument that lifting the construction moratorium at the time of conditional approval does not violate the moratorium's purpose. 672 F.2d at 1007-1008. Just as we have argued, the court found that the construction ban was intended to "provide [an] incentive for states to adopt the route Congress believed would lead to" attainment by the statutory deadlines. *Id.* at 1007. That route is set forth in the SIP requirements in Part D of the Act. Thus, the Second Circuit rejected the position presented here by respondent and concluded that lifting the construction moratorium following the conditional approval of a state plan but before full unconditional approval was inconsistent with the moratorium's purpose.

It is therefore clear that a conflict of circuits exists on an issue of substantial national importance concerning the effective enforcement of the Clean Air Act.

2. Petitioners have contended (Pet. 20-24) that the court below erred in sustaining EPA's conditional approval of the Texas SIP revisions for eight of its air quality areas designated nonattainment for particulate matter (TSP) because the State had not submitted any control strategies and EPA had not found that the State's revisions were in substantial compliance with the Part D requirements or contained only minor deficiencies. We contended (*id.* at 20-21) that this aspect of the court's decision is of national importance because it raises the issue of the scope of EPA's conditional approval authority and the circumstances in which the

conditional approval policy may be validly applied.[5] EPA and Texas present two reasons why this issue does not warrant the Court's review.

First, respondent (EPA Br. 11-12) and the State (Texas Br. 6) contend that the issue of EPA's approval of the SIP revisions for the eight TSP nonattainment areas is moot since the agency has now given unconditional approval to these plan revisions. This contention is plainly without merit.

An issue becomes moot when its determination by a court "cannot effect the result as to the thing in issue in the case * * *." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893). Accord, *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *Brownlow v. Schwartz*, 261 U.S. 216, 217 (1923). Here, a determination that EPA improperly applied its conditional approval authority to the eight TSP nonattainment areas would mean that the construction moratorium should have been applied in those areas from July 1, 1979, until September 29, 1981, when EPA gave final unconditional approval to the SIP revisions for these areas (see Pet. 22, note 17). Thus, the construction or modification during this 27-month period of any major TSP source in these nonattainment areas would have been unlawful and any such source would now have to be enjoined from further operation until, at the very least, it obtains a new permit that is issued in accordance with the State's final unconditionally-approved implementation plan. The issue we have raised regarding the scope of EPA's conditional approval authority is therefore not moot since a determination of the issue in our favor will "affect the result as to the thing in issue in [this] case * * *," namely, the current validity of the operations and the ob-

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[5] The national importance of this issue stems from the widespread application of EPA's conditional approval policy. See page 3, note 4 above.

ligations of major stationary sources in eight of Texas' TSP nonattainment areas.[6]

Second, respondent (EPA Br. 12) and the State (Texas Br. 6) contend that EPA's conditional approval of the Part D revisions for the eight TSP nonattainment areas fails to present an issue of national importance that warrants this Court's review. Respondent and the State have simply missed the significance of this issue to the country's clean air program. While framed in terms of EPA's conditional approval of the TSP portions of the Texas SIP, the issue is considerably broader. As we have earlier emphasized (Pet. 20-22), it involves the scope of EPA's authority to waive the construction moratorium and to decline to promulgate federal SIP provisions[7] when it has found sufficient deficiencies in any state's SIP revisions to preclude it from unconditionally approving them. The issue takes on an even greater national significance in light of the fact that 31 states are required to submit a new set of Part D SIP revisions in the next few months and that EPA will almost certainly apply its conditional approval policy to

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[6] In addition, this Court has often refused to dismiss cases as moot if the issues are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). Issues involving the scope of EPA's conditional approval policy are certain to arise again since 31 states are due to submit additional Part D SIP revisions to EPA this summer and many can be expected to receive a conditional approval of their revisions. See Pet. 16-17; page 3, note 4 above. Moreover, if these issues are considered to be moot once EPA gives unconditional approval to a previously conditionally-approved set of SIP revisions, they will continually escape review since the unconditional approval will likely occur, as here, before the issues can be addressed by a court of appeals and this Court.

[7] Respondent has expressly acknowledged its duty under 42 U.S.C. 7410(c) to promulgate a federal SIP whenever a state has failed to submit a plan meeting the requirements of the Act. EPA Br. 12, note 9.

the majority of these revisions. See Pet. 16-17, page 8, note 4 above.[8]

We submit that, because of its importance to the country's clean air program, this issue regarding the scope of EPA's authority to conditionally approve state plans and plan revisions warrants review by the Court.

3. a. Petitioners have contended (Pet. 25-27) that, in sustaining EPA's unconditional approval of the Texas revisions pertaining to a motor vehicle inspection and maintenance (I/M) program in Harris County, the court below erroneously interpreted the Clean Air Act's provision regarding I/M programs, 42 U.S.C. 7502(b)(11)(B), as requiring neither a schedule for implementation of the I/M program nor proof of legislative authority actually to implement it.

Even though respondent agrees with our contention that the court erred in holding that Texas was not required in its 1979 revisions to show legal authority to implement an I/M program in Harris County (EPA Br. 13 and note 10), it argues (*id.* at 13), as does the State (Texas Br. 9-10), that the issue presented by the court's holding is not of national importance because it will not affect the I/M provisions in the im-

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[8] Texas, but not EPA, argues (Texas Br. 4) that petitioners lack standing to challenge EPA's conditional approval of the SIP revisions covering the eight TSP nonattainment areas. Since neither the State nor EPA contested petitioners' standing in the court below, the record lacks any evidence pertaining to petitioners' standing other than their status as residents in or near Harris County. Nonetheless, their standing to contest EPA's approval of the SIP provisions for the TSP nonattainment areas is obvious. Not only do petitioners travel to these TSP areas, but air pollution travels from these areas to the areas in which they reside. Such allegations of injury from air pollution have been held sufficient to establish standing in suits challenging EPA approval of state implementation plans. See, *e.g.*, *NRDC v. EPA*, 507 F.2d 905, 910 (C.A. 9, 1974). Since affidavits setting forth these facts could easily be filed by petitioners in the event this case were remanded, we submit that Texas' standing contention provides no basis for denial of the petition.

plementation plans of the 30 other states which have received an extension of the attainment deadline to December 31, 1987. This plainly is not so. The court's interpretation that 42 U.S.C. 7502(b)(11)(B) did not require the states in 1979 to establish either a schedule or legal authority for the implementation of their I/M programs and that such authority need not be enacted until mid-1982 means that these states can now argue that they, like Texas, are only required in their 1982 SIP revisions to show that they possess the authority to implement an I/M program in their "extended" nonattainment areas. They will be in the position to argue further that, due to the lead time necessary to put an inspection and maintenance program in operation (see Pet. App. A, 30a), actual implementation of their I/M programs cannot occur until 1983 or even later. Thus, the court of appeals' interpretation of 42 U.S.C. 7502(b)(11)(B) is likely to have significant air pollution consequences across the country. Moreover, the issue presented by the court's interpretation is of central importance to the administration of the Clean Air Act since the motor vehicle inspection and maintenance program is one of only two pollution control measures which Congress specifically required to be implemented in nonattainment areas released from the December 31, 1982, attainment deadline.

b. Petitioners have contended (Pet. 28-30) that the court below erred in interpreting 42 U.S.C. 7502(b)(11)(A) which requires that, for nonattainment areas receiving extensions of the December 31, 1982, attainment deadline, the states "establish a program" requiring a comprehensive analysis of various alternatives to any proposed major source of pollution before a permit may be granted.

Respondent argues that the court did not err. It contends (EPA Br. 15) that, since 42 U.S.C. 7502(b)(11)(A) "does not specify the precise form or content of a state's * * * program, and EPA has not promulgated regulations setting forth minimum requirements

for such a program[,]" a state is "free to develop the program that best fits its own needs." This, it contends, is what Texas did in this case.[9]

We submit that this argument is directly inconsistent with the language and intent of the statute. 42 U.S.C. 7502(b)(11)(A) requires a finding for every major source seeking to locate in an "extended" nonattainment area that its benefits "significantly outweigh" its environmental and social costs. It also requires that an analysis of various alternatives for each proposed source be conducted and that the analysis "demonstrate[]" that the benefits of the source significantly exceed its costs. Finally, the section calls for a "program" which will implement these substantive and procedural requirements. While the states, as respondent contends, have considerable latitude in complying with this requirement for a "program," they simply must do more than turn the entire responsibility for implementing the section's substantive and procedural requirements over to the private companies seeking authorization to build. If Congress had intended the section's analysis of alternatives and its cost-benefit demonstration and finding to be performed enitrely by permit-seeking facilities, it would have imposed these requirements directly upon them. It did not do so. Rather, it required the states to establish a "program" which would apply and enforce these requirements. In so doing, Congress clearly intended the states to play a substantial role in the "program" they established. Since the court of appeals interpreted Section 7502(b)(11)(A) as not requiring Texas to play any part in the "program" it purportedly established under the section, its decision is directly inconsistent with both the language and intent of the statute.

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[9] Texas' "program" consists of nothing other than, first, a check-off box on its permit application form that asks whether the applicant source has performed the Section 7502(b)(11)(A) analysis and, second, a promise from the State not to issue permits to applicants which fail to check the box. See Pet. App. A, 23a-26a.

CONCLUSION

For the reasons above and in the Petition, petitioners respectfully submit that the petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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